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# In The Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, *et al.*,

*Petitioners,*

v.

KATHLEEN M. WINN, *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

In direct conflict with this Court's precedents, and a factually indistinguishable Arizona Supreme Court decision, the Ninth Circuit declared that an educational tax credit program that permits—but in no way encourages or promotes—donations to religious scholarship-granting organizations has the unconstitutional purpose and effect of advancing religion. The questions presented are:

1. May courts reject as a sham a legislature's stated secular purpose for enacting a tax credit simply because it allows taxpayers to choose among religious or nonreligious charities in making their donations?

2. Does a tax credit that advances the legislature's legitimate secular purpose of expanding educational options for families unconstitutionally endorse or advance religion simply because taxpayers choose to direct more contributions to religious organizations than nonreligious ones?

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner-Intervenor Arizona School Choice Trust is a not-for-profit school tuition organization founded in 1993—four years before Arizona enacted the tax credit law being challenged in this case— and is the third-largest nonreligious school tuition organization in Arizona. The Arizona School Choice Trust only provides scholarships to low-income families, but allows those families to use their scholarships at any private school of their choice, whether religious or nonreligious. The Arizona School Choice Trust has no parent corporation and no publicly held company owns stock in it.

Petitioners-Intervenors Luis Moscoso and Glenn Dennard are parents whose children receive scholarships from the Arizona School Choice Trust. Both Moscoso and Dennard have chosen to send their children to religious schools.

Petitioner-Intervenor Arizona Christian School Tuition Organization, Inc. is a tax-exempt nonprofit school tuition organization that provides scholarships to parents who wish to send their children to a private Christian school. It has no parent corporation and no publicly held company owns stock in it.

Petitioner Gale Garriott is the director of the Arizona Department of Revenue.

Respondents Kathleen M. Winn, Diane Wolfthal, Maurice Wolfthal, and Lynn Hoffman are Arizona citizens and residents who pay income taxes on income earned in Arizona.

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## OPINIONS BELOW

Arizona law allows individuals to claim a tax credit for donations to charitable organizations that provide scholarships for children to attend private schools, including both religious and nonreligious schools. For no other reason than the fact that a majority of taxpayers have so far chosen to direct their charitable contributions to organizations that provide scholarships to attend religious schools, a panel of the United States Court of Appeals for the Ninth Circuit, consisting of Judges Fisher, Reinhardt, and Nelson, concluded that the law has the forbidden purpose and effect of advancing religion in violation of the Establishment Clause. The panel decision is reported at 562 F.3d 1002 (2009) and is reproduced in the Appendix (App.) at 1-45.

Over the dissent of eight judges, the Ninth Circuit denied the petitions for rehearing en banc. The original panel concurred with the denial in a written opinion, and Judge Pregerson also concurred in the denial for the reasons stated by the panel in its concurrence. The dissent, authored by Judge O'Scannlain, emphasized that the panel decision conflicts with this Court's prior Establishment Clause cases and warned that it "casts a pall over comparable educational tax-credit schemes in states across the nation." App. 163. The dissenting and concurring opinions concerning rehearing are available at 2009 U.S. App. LEXIS 23077 and appear at App. 138-90.

The district court's decision dismissing this action is reported at 361 F. Supp. 2d 1117 (D. Ariz. 2005) and is reprinted at App. 46-63. This Court's prior decision in this case, *Hibbs v. Winn*, 542 U.S. 88 (2004), and the panel's prior opinion in *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002), are included at App. 67-118 and 119-37, respectively.

## JURISDICTION

The Court of Appeals denied the petitions for rehearing en banc on October 21, 2009. On January 15, 2010, Justice Kennedy granted the Petitioners' joint application to extend the time for filing their petitions until February 18, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Establishment Clause of the First Amendment to the United States Constitution. U.S. Const. amend. I. The challenged Arizona statute allows a tax credit for individuals who voluntarily contribute to nonprofit organizations that provide scholarships to students attending private schools and is codified at Ariz. Rev. Stat. Ann. (A.R.S.)

§ 43-1089 (2009). The Appendix contains copies of these provisions. App. 191-94.

## STATEMENT OF THE CASE

### A. Factual Background

As part of a continuing effort to expand educational opportunities for children, the Arizona Legislature in 1997 approved two tax credits for private donations intended to expand educational options for students. One credit is available to individuals who donate to public schools to fund extracurricular activities. A.R.S. § 43-1089.01 (2010). The other credit, which is the one challenged by Respondents in this case, allows individuals who donate to school tuition organizations—private charities that give families scholarships for children to attend private schools chosen by their parents—to claim a dollar-for-dollar credit up to $500 or $1,000 for married couples not to exceed their total tax liability. A.R.S. § 43-1089. App. 191.

The scholarship tax credit was immediately challenged in state court in 1997. The Arizona Supreme Court exercised original jurisdiction and held the tax credit constitutional under the Establishment Clause of the First Amendment to the U.S. Constitution and the Arizona constitution's religion clauses. *Kotterman v. Killian*, 972 P.2d 606, 616 (Ariz. 1999) ("[W]e conclude that the tuition tax credit does not prefer one religion over another, or religion over nonreligion. It

aids a 'broad spectrum of citizens,' allows a wide range of private choices, and does not have the primary effect of either advancing or inhibiting religion.") (citation omitted).[1] This Court denied certiorari. 528 U.S. 921 (1999).

### 1. Arizona Provides Many Educational Options To Parents

The scholarship tax credit is one part of a broader effort to provide educational options for Arizona's schoolchildren. Before adopting the tax credit, Arizona established a robust charter school law "to provide additional academic choices for parents and pupils." A.R.S. § 15-181 (2009). Nearly 500 charter schools now operate in Arizona and educate more students per capita than any other state in the nation. Howard Fischer, *US giving Arizona funds to create 92 new charter schools*, Ariz. Daily Star, July 31, 2009. Arizona also allows parents to enroll their children in any public school, even schools outside their usual district boundaries, subject only to classroom availability. A.R.S. § 15-816.01(A) (2009).

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[1] On October 28, 2009, after both the panel decision and the Ninth Circuit's denial of rehearing en banc in this case, the Arizona Supreme Court declined to review the Arizona Court of Appeals' opinion in *Green v. Garriott*, 212 P.3d 96 (Ariz. App. 2009), which rejected a nearly identical Establishment Clause challenge to Arizona's separate tax credit for corporate contributions to school tuition organizations. App. 206-07. The Arizona Supreme Court thereby declined to revisit its holding in *Kotterman*.

Arizona also gives wide latitude to families that home school. A.R.S. § 15-802 (2009).

Arizona continues to expand parental choice through both private and public options. Arizona now operates an online public school known as the Arizona Virtual Academy. *See* Arizona Virtual Academy, http://www.k12.com/azva (last visited Jan. 15, 2010). Many school districts now operate "traditional" academies—using a back-to-basics curriculum and requiring students to wear uniforms—alongside their neighborhood public schools. *See, e.g.*, Chandler Traditional Academy, http://www.mychandlerschools.org/freedom (last visited Jan. 15, 2010). In 2006, Arizona adopted a tax credit for corporate contributions to school tuition organizations that fund scholarships for low- and middle-income families who transfer from public to private school. A.R.S. § 43-1183 (2009). And just last year, Arizona created a new tax credit for corporate contributions to school tuition organizations that fund scholarships for children with disabilities and children in foster care. A.R.S. § 43-1184 (2009).

### 2. Arizona's Scholarship Tax Credit Operates Based On Private Choice

Arizona's scholarship tax credit allows individual taxpayers to claim a dollar-for-dollar credit against their taxes due for charitable donations to school tuition organizations. School tuition organizations must obtain federal recognition as a nonprofit

organization pursuant to § 501(c)(3) of the Internal Revenue Code. A.R.S. § 43-1089(G)(3). App. 194. They must pay out at least 90% of their revenue in the form of scholarships to students attending private schools. *Id.* App. 194. They may not restrict all of their scholarships to students attending the same school. *Id.* App. 194. Donors may not request that their contribution be used to benefit a dependent. A.R.S. § 43-1089(E). App. 192. School tuition organizations also may not award scholarships to students who attend schools that discriminate on the basis of race, color, handicap, familial status, or national origin. A.R.S. § 43-1089(G)(2). App. 193-94. They may award scholarships to students attending same-gender schools. There are no other limits placed on school tuition organizations. Therefore, as this Court recognized in its prior opinion in this case, school tuition organizations "are not precluded by Arizona's statute from designating schools that provide religious instruction or that give admissions preference on the basis of religion or religious affiliation." App. 71.

Fifty-five school tuition organizations have been established, all except the Arizona School Choice Trust after passage of the tax credit law. *See* Ariz. Dep't of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2008* (2009) (reproduced at App. 208-36). These different organizations serve a wide variety of needs, teaching methods, and geographic areas. The various school tuition organizations work to meet the needs of markedly different student

populations. For example, five organizations currently offer scholarships to families seeking a non-religious Montessori-style education. App. 223-24. Other organizations serve students in particular geographic areas, such as children attending private schools on Native American reservations or in particular cities outside the state's major metropolitan areas. App. 223-24. Many organizations affiliate themselves with particular religious entities, App. 223-24, which is not surprising considering that a large percentage of Arizona's private schools are religious. *See, e.g., Kotterman*, 972 P.2d at 626 ("At least seventy-two percent of [Arizona private] schools are sectarian") (Feldman, J., dissenting) (citing Michael Coffey, *A Survey of Arizona Private Schools* (Goldwater Institute, Issue Analysis #129, 1993)). The practical impact of these diverse organizations is more money for scholarships and more choices for parents.

According to the most recent data reported to the Arizona Department of Revenue (the "Department"):

- Arizona's 55 school tuition organizations awarded 28,321 scholarships in 2008. App. 224.
- At least 30 of the 55 school tuition organizations have no obvious religious affiliation. App. 223-24.
- The third largest school tuition organization, the Arizona Scholarship Fund, has no religious affiliation. App. 221.

- Four of the top ten school tuition organizations in terms of both donations and scholarships have no religious affiliation. App. 221-24.
- The average scholarship amount in 2008 was $1,909. App. 224.
- Students used the scholarships to attend 373 different private schools—including nearly 100 private schools that have no obvious religious affiliation. App. 209, 227-34.

### B. Proceedings Below

This challenge to Arizona's tax credit was filed in federal court on February 15, 2000, shortly after this Court denied the petition for certiorari in *Kotterman*. The Respondents' complaint asserts that the tax credit violates the Establishment Clause both facially and as-applied because it authorizes school tuition organizations to award scholarships to families "to pay tuition for students at religious schools." App. 203.

The district court initially dismissed the complaint pursuant to the Tax Injunction Act, 28 U.S.C. § 1341. The Ninth Circuit reversed and this Court affirmed that decision. App. 67-137. Upon remand, two school tuition organizations and two parents whose children rely on tax-credit-funded scholarships intervened and moved to dismiss the complaint. On March 24, 2005, the district court granted the

Arizona School Choice Trust, *et al.*'s motion to dismiss, holding that no valid claim could be stated against the tax credit because it is a facially neutral program based on true private choice. App. 61-62. The Respondents appealed.

At oral argument before the Ninth Circuit on January 24, 2008, the Respondents substantially altered their claims and theories of the case by abandoning their facial claims. App. 7, n.5. They did so without any prior notice to the panel or to counsel for Petitioner Garriott or the Petitioners-Intervenors. Respondents now concede that the statute is facially neutral with regard to religion and that there is no constitutional violation when parents choose to use scholarships to attend religious schools. App. 8, n.6, 33-34.

On April 21, 2009, the Ninth Circuit reversed the district court's dismissal and reinstated the Respondents' as-applied legal challenge, which is based on the fact that most Arizona taxpayers choose to donate to religiously affiliated school tuition organizations. Petitioner Garriott and Petitioners-Intervenors filed timely petitions for rehearing en banc on May 14, 2009. The Ninth Circuit issued its order denying rehearing on October 21, 2009. App. 138. Eight judges dissented from the denial of the petition for rehearing en banc because they believed that the panel decided an important federal question in a way that conflicts with relevant decisions of this Court and "jeopardiz[es]

the educational opportunities of hundreds of thousands of children nationwide." App. 163.

### C. Petitioner Arizona School Choice Trust Is Being Directly Challenged In This Case

The Respondents asserted at oral argument and the panel opinion agreed that Petitioner-Intervenor Arizona School Choice Trust "is not being directly challenged" in this case. App. 8, n.6. That is incorrect. The panel's decision specifically revived the Respondents' claim under the first prong of the *Lemon* test, which asks whether the tax credit was enacted for a valid secular purpose. If the district court answers no to that question on remand, it will have to enjoin the entire tax credit law as unconstitutional, *see Wallace v. Jaffree*, 472 U.S. 38, 56 (1985), thus preventing taxpayers from claiming credits for contributions to the Arizona School Choice Trust. As a result, the Arizona School Choice Trust has a significant and protectable interest in the outcome of this case.

## REASONS FOR GRANTING THE PETITION

### I. THE NINTH CIRCUIT'S DECISION WARRANTS SUMMARY REVERSAL BECAUSE IT ERRONEOUSLY HELD THAT A RELIGIOUSLY NEUTRAL TAX CREDIT BASED ON TRUE PRIVATE CHOICE VIOLATES THE ESTABLISHMENT CLAUSE MERELY BECAUSE THE LEGISLATURE ALLOWS DONATIONS TO BOTH RELIGIOUS AND NONRELIGIOUS SCHOLARSHIP-GRANTING ORGANIZATIONS AND MOST TAXPAYERS CHOOSE TO DONATE TO RELIGIOUS CHARITIES

The Ninth Circuit's April 2009 decision warrants summary reversal because it clearly and directly conflicts with this Court's numerous Establishment Clause precedents upholding religiously neutral laws based on true private choice. *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Agostini v. Felton*, 521 U.S. 203 (1997). The panel decision also conflicts with the Arizona Supreme Court's decision upholding the challenged law in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), and, as Judge O'Scannlain's dissent explains, "it jeopardizes the educational opportunities of thousands of children who enjoy the benefits of . . . [Arizona's tax credit] and related programs across the

nation." App. 190. Two aspects of the panel's decision must be reversed because they openly conflict with this Court's Establishment Clause precedents.

First, the panel mistakenly concluded that the legislature's decision to allow taxpayers to donate to either religious or nonreligious school tuition organizations may render a statute's stated secular purpose "a sham" if the majority of taxpayers choose to donate to religiously affiliated entities. App. 18-20, 157-61. The panel reasoned that the legislature may have had a hidden desire to advance religion when it provided taxpayers the ability to choose among religious and nonreligious scholarship organizations because it might have "known" that taxpayers would donate more money to religious than to nonreligious organizations. App. 158. But that reasoning is squarely at odds with this Court's long-standing approval of tax benefits that flow to both religious and nonreligious entities, such as deductions for contributions made directly to religious charities and tax exemptions for religious organizations, *see, e.g., Walz v. Tax Comm'n*, 397 U.S. 664 (1970), as well as the principle that only "government action itself" can reveal an otherwise valid purpose to be a sham. *McCreary County v. ACLU*, 545 U.S. 844, 862 (2005). The panel's conclusion also directly conflicts with the Arizona Supreme Court's careful analysis and conclusion that the challenged law was passed for a valid secular purpose. *Kotterman*, 972 P.2d at 611-12.

Second, the panel held that a religiously neutral tax credit based on private choice violates the

Establishment Clause if too many taxpayers contribute to religious charities. App. 21-22. The panel's reliance on annual statistics about where private individuals choose to direct their charitable donations conflicts with this Court's repeated instruction not to ground the constitutionality of a facially neutral law on "annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller*, 463 U.S. at 401; *see Zelman*, 536 U.S. at 658 ("The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."). The panel's holding is in direct conflict with this Court's Establishment Clause precedents—which "have never found a program of true private choice to offend the Establishment Clause." *Zelman*, 536 U.S. at 653. The panel's holding also contradicts the Arizona Supreme Court's holding that no reasonable observer could conclude the tax credit law constitutes the governmental endorsement of religion. *Kotterman*, 972 P.2d at 614.

### A. Allowing Taxpayers To Choose Between Religious Or Nonreligious Charities Does Not Render A Tax Credit That The Legislature Enacted To Promote A Valid Secular Purpose A "Sham," Even If Most Donations Go To Religious Charities

The touchstone of Establishment Clause jurisprudence is religious neutrality. *E.g.*, *Walz*, 397 U.S. at 669. Under no circumstance may the government enact a law intended either to inhibit or advance religion, or to endorse one religion over another. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947); *Larsen v. Valente*, 456 U.S. 228, 244 (1982). Thus, the threshold Establishment Clause question is whether the state acted with a valid, neutral, and nonreligious purpose when it passed a challenged law. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). As Judge O'Scannlain wrote in his dissent, "a program of scrupulous 'governmental neutrality between religion and religion, and between religion and nonreligion' cannot violate the Establishment Clause." App. 162 (citation omitted).

A claim that the government passed a law for an improper purpose is a question only for a facial challenge. *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988). A statute's secular purpose cannot be challenged as-applied. *Id.* The Respondents abandoned their facial claims at oral argument, meaning they abandoned their challenge to the tax credit law's secular purpose. App. 7, n.5. The panel thus erred by reviving Respondents' challenge to the tax credit's

secular purpose. By reinstating a facial claim to the tax credit law, the panel invited the district court to strike down the tax credit law in its entirety.

In light of the serious consequences attached to finding that a law was motivated to endorse or advance religion, this Court has always been reluctant "to attribute unconstitutional motives to the states." *Mueller*, 463 U.S. at 394. This is especially true when, as in this case, there is nothing in the text, legislative history, or other state action suggesting the government was motivated by a desire to advance (or inhibit) religion. *Id.* Yet the panel held that the legislature's stated purpose could be merely a charade to mask improper governmental motives because it set up a system under which taxpayers might favor religion when exercising their voluntary choice to contribute to either religiously affiliated or nonreligious school tuition organizations. App. 18-20, 157-61. But "[t]he legislature could hardly have had the 'purpose' of endorsing religion when it set up a plan that, for all it knew, could have resulted in absolutely no funding for religious entities." App. 188-89 (O'Scannlain, J., dissenting).

As demonstrated below, there is nothing in the text of the tax credit law, nothing in the legislative history, and nothing in the government's implementation of the law—or any other official act—that could lead an objective observer to conclude that the legislature acted with an improper religious motivation.

### 1. The Tax Credit's Text Is Facially Neutral With Regard To Religion

Every court to consider the tax credit law—including the Ninth Circuit—has agreed that the statute is facially neutral. *Kotterman*, 972 P.2d at 611; App. 34 (panel decision), 54 (district court). As the district court said, the law does not mention religion or "provide taxpayers or students financial incentives which are skewed toward religious schools." App. 57. Because the tax credit amount does not vary depending on the type of school tuition organization, there is no financial incentive to donate to a religiously affiliated school tuition organization over a nonreligious organization.

Of course, on its own, "[f]acial neutrality is not determinative." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). If there is any "[o]fficial action that targets religious conduct for distinctive treatment," such action "cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* In this case, however, there is no official action, no allegation by Respondents, nor any finding by the Ninth Circuit that suggests the government had any hidden motive to favor or disfavor religion by enacting the tax credit law. "Here, the alleged impropriety arises from taxpayer, not government action." App. 188 (O'Scannlain, J., dissenting).

### 2. There Is No Legislative History Suggesting An Improper Purpose

The Arizona Supreme Court thoroughly examined the context and legislative history surrounding the adoption of the tax credit law and readily discerned a wide variety of valid secular purposes for the law. *Kotterman*, 972 P.2d at 611. Neither the Respondents nor the panel assert the existence of any legislative history that suggests an improper purpose motivated Arizona to enact the tax credit law. On the contrary, the panel and Respondents agree that the legislative history reveals the law's primary sponsor acted with a purpose that was "both secular and valid." App. 18.

Yet the panel questioned whether this stated purpose is "genuine" because the legislature enacted a system under which Arizona taxpayers are free to donate their money to religiously affiliated school tuition organizations. App. 18-20, 157-61. The panel then held that the decisions by taxpayers to donate more money to religious school tuition organizations are "probative" of whether the legislature actually knew this is how taxpayers would behave. App. 160. But the panel itself demonstrated why this is an untenable position by concluding that money is directed to school tuition organizations "only as a result of the genuine and independent choice of . . . Arizona taxpayer[s]." App. 34. Because the law gives taxpayers a genuine choice regarding their donation, it was not possible for the legislature to know who, if anybody, would donate to school tuition organizations

or to which school tuition organizations they would donate. Indeed, when the legislature passed the tax credit law there was only one scholarship-granting organization in Arizona, the *nonreligious* Arizona School Choice Trust.

### 3. Private Charitable Contributions Are Not Official Acts Attributable To The Government Under The Establishment Clause

It is axiomatic that only governmental action can violate the Establishment Clause. Here, the state's involvement ends with its authorization of the tax credit for donations to school tuition organizations. App. 165 (O'Scannlain, J., dissenting). Anyone can create a school tuition organization. App. 165 (O'Scannlain, J., dissenting). Anyone can donate to any school tuition organization "and receive identical tax benefits." App. 165 (O'Scannlain, J., dissenting). "Anyone can apply for any scholarship offered by any S[chool] T[uition] O[rganization]." App. 165 (O'Scannlain, J., dissenting).

The panel nevertheless tried to find *some* form of government action that might "belie" the legislature's stated, and otherwise valid, secular purpose for the tax credit law. It did so by pointing to the fact that "the Arizona Department of Revenue *allows* tax credits for contributions to S[chool] T[uition] O[rganization]s that provide scholarships only to religious schools." App. 160 (emphasis added). The implication is that

the Department's *implementation* of the tax credit law (1) is contrary to the statute that created the tax credit (which the panel concedes is facially neutral) and (2) reveals an actual legislative purpose to advance religion.

The panel's suggestion—that in interpreting the statute to allow credits for contributions to religiously affiliated school tuition organizations, the Department revealed the legislature's stated purpose for the credit to be a "sham"—is meritless.

The text of the law itself explicitly allows school tuition organizations to limit scholarships to either religious or nonreligious schools. A.R.S. § 43-1089(G)(3). App. 194. Indeed, the Respondents' complaint recognizes as much, noting that school tuition organizations "may . . . restrict their grants to students attending religious schools." App. 198; *see also* App. 188 (O'Scannlain, J., dissenting) ("But that result is apparent from the statute itself, which is satisfied so long as S[chool] T[uition] O[rganization]s provide scholarships to two or more schools, a fact plaintiffs themselves recognize in their complaint.") (citation omitted). Moreover, every court to consider the tax credit law, including the Ninth Circuit in its prior opinion in this case, has understood the law to permit the establishment and operation of religiously affiliated school tuition organizations. App. 71 (this Court in *Hibbs v. Winn*), 121 (the Ninth Circuit in *Winn v. Killian*), 50 (district court); *Kotterman*, 972 P.2d at 614 (recognizing that school tuition organizations "may not limit grants to students of only one"

private school). Thus, the panel's suggestion that the Department has implemented the tax credit law in a way that belies the legislature's stated, secular purpose fails. The plain language of the statute permits school tuition organizations to limit the availability of scholarships to students attending religious schools.

The panel also ignored the fact that many school tuition organizations—such as the Montessori and Waldorf school tuition organizations—exist only to serve nonreligious private schools. App. 223-24. If the Department did as the panel suggested and refused to permit individuals to claim a tax credit for donations to religious organizations while allowing a credit for donations to nonreligious organizations, the scholarship tax credit would cease to operate in a manner neutral to religion and would actually operate in a discriminatory fashion against religion. The Department would also have to ignore the plain text of the tax credit law, which grants school tuition organizations wide latitude in awarding scholarships —just as federal and state tax laws allow private and religious charities wide latitude in their operations.

### 4. An Objective Observer Examining The Text, Legislative History, Implementation, And Private Conduct Associated With The Tax Credit Would Conclude That The Government Enacted The Law For A Valid Secular Purpose

When it is alleged that the government's stated purpose is not genuine, but instead a pretense to advance or inhibit religion, a court asks whether an objective observer who takes "account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act" would conclude that the stated purpose is merely a charade designed to mask improper government motives. *McCreary*, 545 U.S. at 862. Here, there is nothing in the legislative history or the Department's implementation of the tax credit law that could lead an objective observer to believe that the legislature intended to advance or endorse religion when it enacted the law.

An objective observer would see (1) that school tuition organizations are privately founded and operate without any governmental influence or control; (2) that private citizens decide how much to contribute to school tuition organizations and have a genuine choice as to which organizations they contribute; and (3) that any parent is free to apply to any school tuition organization to attend any school supported by that organization. "No *reasonable* observer would think this lengthy chain of choice suggests the

government has endorsed religion." App. 190 (O'Scannlain, J., dissenting).

Unde limited circumstances, private conduct might be obative of a law's purpose, but neither the Respondents nor the panel identified any relevant private conduct in this case. This Court's decision in *Lukumi* illustrates the proper use of private conduct to determine the government's purpose for enacting an otherwise neutral law. In *Lukumi*, this Court took notice of the fact that many residents expressed their concern to the City Council about the religious practices of the Santeria church during an "emergency public session." *Lukumi*, 508 U.S. at 526. The Council reacted to the public's animosity toward the Santeria religion by enacting several resolutions and ordinances aimed at preventing that church from engaging in its practice of ritual animal sacrifice. *Id.*; *cf. Staley v. Harris County, Tex.*, 461 F.3d 504 (5th Cir. 2006), *vacated*, 470 F.3d 1086 (5th Cir. 2006), *declared moot*, 485 F.3d 305 (5th Cir. 2007) (examining the public's reaction to the state's erection of a statue containing symbol of Christian religion as part of religious-purpose inquiry).[2] As *Lukumi* makes

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[2] The panel's citation to *Bonham v. District of Columbia Library Administration*, 989 F.2d 1242 (D.C. Cir. 1993), App. 159, n.9, is inapposite because *Bonham* does not involve any examination of private action. *Bonham* reversed the dismissal of a complaint alleging that the District of Columbia closed one of its libraries on Easter for an improper religious purpose. The district court had dismissed the case even though the government had not asserted any purposes underlying the statute in

(Continued on following page)

clear, private religious discrimination (or even private action favoring religion) that actually prompts some specific governmental action can be used to show that an otherwise facially neutral law might have been motivated by an improper purpose. However, private decisions that had no influence on the law's enactment and that are not coerced in any way by the government can shed no light on the legislature's motivations for enacting the law.

Under this Court's controlling precedents, the legislature's enactment of a tax credit law that provides taxpayers a genuine choice to donate to both nonreligious and religious school tuition organizations—even if the majority of taxpayers choose to donate to religious charities—cannot lead an objective observer to conclude the government acted with an improper purpose when it enacted the law.

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moving to dismiss solely on procedural grounds. In reversing, the D.C. Circuit merely required the district court to examine the government's purpose for enacting the law. 989 F.2d at 1245.

### B. The Panel Opinion Directly Conflicts With This Court's Determination That Religiously Neutral Laws Based On True Private Choice Do Not Violate The Establishment Clause And With The Arizona Supreme Court's Ruling That No Reasonable Observer Could Conclude The Tax Credit Endorses Religion

Once a court is satisfied the legislature acted with a valid secular purpose, the next question is whether a reasonable observer would conclude that the law has the forbidden effect of advancing or endorsing religion. *Agostini*, 521 U.S. at 223. The Arizona Supreme Court answered that very question of this tax credit by saying, "[u]nder the circumstances, we believe that 'no reasonable observer is likely to draw from [these facts] an inference that the State itself is endorsing a religious practice or belief.'" *Kotterman*, 972 P.2d at 614 (second alteration in original) (quoting *Witters*, 474 U.S. at 493 (O'Connor, J., concurring)).

This Court has confronted four Establishment Clause challenges to neutral government programs based on private choice, like the tax credit at issue here, and four times this Court has rejected such challenges. *Mueller*, 463 U.S. 388; *Witters*, 474 U.S. 481; *Zobrest*, 509 U.S. 1; *Zelman*, 536 U.S. 639. Every court in the country to consider a similar constitutional challenge—with the exception of the Ninth Circuit in this case—has rejected such challenges.

Two significant factors govern this inquiry. First, "[f]or a law to have the forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987). But as Judge O'Scannlain aptly observed, this case is notable "for what it does not involve: state action advancing religion." App. 162. Second, the court must consider whether the challenged law coerces individuals to choose religion over nonreligion, or one religion over another. "Far from 'coercing' parents into sending their children to religious schools, Arizona provides a wide variety of secular alternatives." App. 180 (O'Scannlain, J., dissenting).

The panel's contrary conclusion is a clear departure from this Court's precedents and conflicts with the Arizona Supreme Court's decision in *Kotterman*. The panel's holding is erroneous for three reasons: (1) every decision under the tax credit program is private; (2) the panel's holding is premised on irrelevant annual statistics about where taxpayers donate their money; and (3) no parent is coerced into sending their child to a religious school.

### 1. The Tax Credit Is Based On True Private Choice

When a law is based on "true private choice, with no evidence that the State deliberately skew[s]

incentives toward religious schools, [that is] sufficient for the program to survive scrutiny under the Establishment Clause." *Zelman*, 536 U.S. at 650. As this Court stated in *Mueller*, 463 U.S. at 400, the "historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case."

Private choice imbues every aspect of Arizona's tax credit law. As Judge O'Scannlain observed:

> Multiple layers of private, individual choice separate the state from any religious entanglement: the "*government itself*" is at least four times removed from any aid to religious organizations. First, an individual or group of individuals must choose to create a[ ] S[chool] T[uition] O[rganization]. Second, that S[chool] T[uition] O[rganization] must then decide to provide scholarships to religious schools. Third, taxpayers have to contribute to the S[chool] T[uition] O[rganization] in question. Finally, parents need to apply for a scholarship for their student.

App. 169.

Considering that the government itself does not disburse the tax credit's benefits, there is no way for the government to grant any special favors that might lead to a religious establishment. *See Mitchell*

*v. Helms*, 530 U.S. 793, 810 (2000). For example, once a school tuition organization is established, it is up to its board and staff to solicit charitable contributions from taxpayers, and the law provides no financial incentive for taxpayers to donate to religiously affiliated scholarship organizations over nonreligious organizations. Parents also have no financial incentive to choose a religious education. In fact, there are financial *disincentives* for parents to choose a private education—whether religious or nonreligious—because, as the district court noted, the average scholarship amounts are low enough to mean that *every* private school is going to require some form of copayment from the parents. App. 57; *see also Zelman*, 536 U.S. at 654 (noting that "[t]he program here in fact creates financial *dis*incentives for religious schools"). Public schools, including public charter and magnet schools, on the other hand, are free of charge to the parents.

"In every respect and at every level, these are purely private choices, not government policy." App. 169 (O'Scannlain, J., dissenting).

### 2. Annual Statistics Concerning How Taxpayers Choose To Donate Are Irrelevant To The Constitutional Inquiry

The panel's decision relied heavily on annual statistics about where beneficiaries choose to direct their benefits to support its conclusion. App. 31.

These statistics are irrelevant to the constitutional inquiry. *Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").

The wisdom of this Court's refusal to consider the ever-changing dynamics of laws based on true private choice is borne out by looking at how much has changed about the tax credit since this lawsuit was filed in 2000. The number of school tuition organizations has more than tripled since this lawsuit was filed. *Compare* App. 199 with 211. Thirty of the 55 school tuition organizations have no obvious religious affiliation. App. 166, n.6 (O'Scannlain, J., dissenting). The third largest school tuition organization in 2008, the Arizona Scholarship Fund, has no religious affiliation. App. 221. Indeed, four of the top ten school tuition organizations have no religious affiliation. App. 221-22. And students used the over 28,000 scholarships issued by these organizations to attend 373 different private schools—including nearly 100 private schools that have no obvious religious affiliation. App. 227-34.

This Court has stated that attributing constitutional significance to constantly fluctuating statistics about where private individuals choose to use their benefits would lead to the "absurd result that a neutral school-choice program might be permissible" in some states where a lower percentage of individuals choose religion, but not in states where high

percentages of individuals choose religion. *Zelman*, 536 U.S. at 657. In this case, over time, the program has become "less" religious rather than "more" religious—not because of any state action, but because of private choice. And while the pendulum may swing again in the future back toward religion, any reasonable observer who is familiar with the way the law works would attribute that swing not to the government, but to individual taxpayers.

Hinging the constitutionality of a neutral tax credit law on the fact that individuals donate a lot of money to religious organizations also jeopardizes numerous other tax credit laws—and such reasoning could easily spill over into challenges to tax deductions and exemptions. *See Kotterman*, 972 P.2d at 618 (finding no "principled" distinction between tax credits and "other established tax policy equivalents like deductions and exemptions"). Considering that Americans donate significant sums each year to religious charities, the panel's holding, if logically and consistently applied, places the constitutionality of other tax benefits in grave jeopardy.

The panel constructs an artificial distinction between the financial benefits flowing from a tax credit versus a typical tax deduction to justify its departure from this Court's precedents. App. 11, 25. As the Arizona Supreme Court noted, this "would appear to be a matter of form rather than substance." *Kotterman*, 972 P.2d at 618. The panel's approach is not a principled standard by which to evaluate different types of tax benefits. For example, the tax

exemption approved in *Walz* is arguably far more valuable to religious organizations than an indirect, third-party tax credit. A credit merely reduces the amount of taxes owed while an exemption allows an organization to completely escape the government's taxing authority.

Additionally, the panel placed a heavy emphasis on the fact that Arizona's tax credit is a dollar-for-dollar credit. App. 14. But not all tax credits are dollar-for-dollar. At what point does a tax credit violate the constitution? Is it only at 100%? Would a credit that allowed 80% of the contribution to be claimed pass muster? The panel provides no guidance on this crucial question. Fortunately, there is no need to answer the question because this inquiry is totally irrelevant to the constitutionality of facially neutral laws based on private choice.

### 3. The Tax Credit Does Not Coerce Parents Into Sending Their Children To Religious Schools

At the heart of the Establishment Clause's "effects" inquiry is whether Arizona's tax credit coerces parents into sending their children to religious schools. *Zelman*, 536 U.S. at 655-56. The answer to that question is clearly "no" because that question "must be answered by evaluating *all* options [the state] provides [its] schoolchildren, only one of which is to obtain a program scholarship and . . . choose a religious school." *See id.* at 656; *see also id.* at 663

(O'Connor, J., concurring) (emphasizing that the court's inquiry "should consider all reasonable educational alternatives to religious schools that are available to parents").

"The panel did not even engage in this inquiry." App. 178 (O'Scannlain, J. dissenting). The panel "reject[ed] the suggestion that the mere existence of the public school system guarantees that any scholarship program provides for genuine private choice." App. 32. The inquiry, however, is not whether a public school system exists. Rather, the court must evaluate and consider the range of nonreligious educational options provided to parents by the state.

Arizona leads the nation in offering families educational choice. Jay P. Greene, *The Education Freedom Index*, 2000, at 2 (Manhattan Inst. for Policy Research, Civic Report No. 14, 2000) (ranking Arizona first in educational freedom). Parents who want their children to receive a nonreligious education have ample options from which to choose, including nearly a hundred nonreligious private schools that receive scholarships from school tuition organizations. As the Arizona Supreme Court explained:

> The Arizona Legislature has, in recent years, expanded the options available in public education. *See, e.g.*, A.R.S. § 15-181 (1994) (establishing charter schools in order to "provide additional academic choices for parents and pupils"); A.R.S. § 15-816.01(A) (1995) (requiring all public school districts to "implement an open enrollment program

> without charging tuition"). It now seeks to bring private institutions into the mix of educational alternatives open to the people of this state.

*Kotterman*, 972 P.2d at 611. Since *Kotterman*, Arizona has become the national charter school leader, with more charter schools per capita than any other state. Fischer, *supra*. Arizona has also since established a "virtual academy" that offers a public school education online. *See* Arizona Virtual Academy, http://www.k12.com/azva (last visited Jan. 15, 2010). And local school districts have established "traditional academies" in addition to the common district schools. *See, e.g.*, Chandler Traditional Academy, http://www.mychandlerschools.org/freedom (last visited Jan. 15, 2010).

The panel reasoned that taxpayers, because they have a genuine choice as to where they donate their money, actually limit—rather than expand—parental choice by directing large sums of money to religiously affiliated school tuition organizations. App. 29-33. But "[t]he question is not whether a parent's choice is somehow limited or constrained, the question is whether the *government* has somehow limited or constrained the choice." App. 172 (O'Scannlain, J., dissenting). The fact is that private decisions will often limit parental choice under similar educational aid programs.

For example, in *Zelman* many nonreligious private schools chose not to participate in the voucher

program, as did neighboring public schools. 536 U.S. at 656-57. This resulted in the voucher participants not having the choice to attend many nonreligious private or public schools. *Id.* The *Zelman* majority refused to "attribute constitutional significance" to such decisions because doing so would lead to the absurd result that a facially neutral school choice program might be constitutional in some places or at certain times, but not others. *Id.* at 657. Thus, even if all taxpayers chose to donate to religious schools—instead of increasingly giving to nonreligious school tuition organizations as is the current trend in Arizona—the tax credit law would still be constitutional and the law would still result in more options for Arizona parents, not fewer options. The only way to limit parental choice would be to disrupt the neutral operation of the law. "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time most private schools are run by religious organizations," or in this case, why most taxpayers choose to donate to religious school tuition organizations. *Zelman*, 536 U.S. at 657.

In light of all of the nonreligious options, both public and private, no family in Arizona is coerced into choosing a religious education. The panel's conclusion that the state's tax credit for donations to both nonreligious and religious school tuition organizations is coercing parents into sending their children to religious private schools is profoundly mistaken.

#### 4. No Reasonably Informed Observer Could Conclude That By Enacting The Scholarship Tax Credit The Government Is Advancing Or Endorsing Religion

This Court has "repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." *Zelman*, 536 U.S. at 654-55. A reasonable observer examining Arizona's law would discover: (1) the state provides no direct aid to religious organizations; (2) the state has not provided any incentives for taxpayers to donate to religious over nonreligious school tuition organizations; and (3) no parent is coerced into sending their child to a religious school because the state provides myriad nonreligious educational options to Arizona families. The only conclusion for any reasonable observer is that the tax credit does not violate the Establishment Clause.

## II. THE PANEL'S DECISION CASTS A CONSTITUTIONAL CLOUD OVER TAX CREDIT LAWS NATIONWIDE AND JEOPARDIZES THE EDUCATIONAL FUTURE OF THOUSANDS OF CHILDREN RELYING ON TAX-CREDIT-FUNDED SCHOLARSHIPS

The panel's decision casts doubt on the validity of similar educational tax credits being considered

throughout the country and credits already adopted in other states. And because there is no limiting principle in the panel's decision, nothing prevents its holding from being extended to other kinds of tax credits, meaning the decision could raise serious concerns for other types of charitable tax credits that allow donations to religious charities—such as charities that provide child and other dependent care and charities that offer assistance to the working poor.

### A. The Decision Casts A Cloud Of Uncertainty Over Proposed And Existing Educational Tax Credits

The panel's holding "could derail legislative efforts" in other states seeking "to create similar programs," App. 163 (O'Scannlain, J., dissenting), and it raises constitutional concerns about existing educational tax credits. At least four states in the Ninth Circuit are considering adopting scholarship tax credit laws and five states currently allow tax credits for contributions to charitable, scholarship-granting organizations similar to the challenged Arizona law. App. 163, n.1 (O'Scannlain, J., dissenting); Fla. Stat. § 220.187 (2009) (corporate tax credit for contributions to scholarship-funding organizations); Ga. Code Ann. § 48-7-29.16 (2009) (individual and corporate tax credits for donations to student scholarship organizations); Iowa Code § 422.11S (2010) (individual tax credit for donations to school tuition organizations); 72 Pa. Cons. Stat. §§ 8701-F to 8708-F

(2009) (corporate tax credit for contributions to scholarship organizations); R.I. Gen. Laws §§ 44-62-1 to -7 (2009) (corporate tax credit for donations to scholarship organizations). Arizona also allows tax credits for corporate contributions that fund scholarships for low-income and special-needs children. *See* A.R.S. §§ 43-1183, -1184.

Arizona's other tax credit laws, along with the Georgia, Iowa, Pennsylvania, and Rhode Island tax credit laws, operate in a manner analogous to the scholarship tax credit law at issue here by allowing religiously affiliated scholarship-granting organizations to operate and receive tax-credit-eligible donations. The panel's flawed opinion should not be allowed to inhibit the passage of new programs, nor be permitted to disturb the operations of other established and religiously neutral educational tax credit laws.

### B. The Decision Jeopardizes Other Types Of Charitable Tax Credit Laws

Religious charities routinely participate in social welfare programs under which tax-credit-eligible contributions can be made. For example, Arizona provides tax credits for donations made to organizations that provide assistance to the working poor, including religious organizations. A.R.S. § 43-1088 (2009); Ariz. Dep't of Revenue, *List of qualifying charitable organizations*, http://www.azdor.gov/LinkClick.aspx?fileticket=OImvlZYxatI%3d&tabid=133 (includes many religious

charities) (last visited Jan. 15, 2010). Other states allow tax credits for contributions to religious organizations that provide child and other dependent care. *E.g.*, Fla. Stat. § 220.19 (2009); Florida Dep't of Children and Families, *Child Care Regulation*, http://www.dcf.state.fl.us/childcare (last visited Jan. 15, 2010) (list of qualified child care providers, including religious organizations); 35 Ill. Comp. Stat. 5/210 (2010) (dependent care tax credit allowing funds to be used at religious service providers); Iowa Admin. Code r. 701-42.9(422) (2009); Iowa State University, *Child Care Tax Credit on Income Tax*, http://www.extension.iastate.edu/Publications/PM1848.pdf (allowing religious charities to serve as eligible care providers) (last visited Jan. 15, 2010).

These examples only scratch the surface. Absent immediate intervention by this Court, there is no telling how wide-reaching the negative ramifications will be from the panel's opinion, especially when it is taken into account that Americans donate a substantial sum of money to religious organizations every year.

### C. The Panel Decision Threatens To Disrupt The Educational Future Of Thousands Of Arizona School Children

As it currently stands, the panel decision will inhibit taxpayer donations to school tuition organizations because taxpayers will fear that if the law is struck down they will be found to owe additional

taxes; the only way to eliminate that uncertainty is to forgo donating. Every day this decision stands is another day donations to school tuition organizations that fund scholarships for children who desperately need them will be chilled.

If this case returns to the district court, as Judge O'Scannlain points out, the district court may have "no choice but to declare the program unconstitutional as applied" because no one disputes "how the program operates in practice." App. 167, n.7. If that happens, the panel's decision has the potential to uproot tens of thousands of Arizona school children who are thriving in their current private schools. For nearly a decade these children have had the Arizona Supreme Court's assurance that the tax credit law is constitutional, but the Ninth Circuit's decision straying from this Court's established precedent has cast a dark shadow over their educational futures.

In light of the glaring errors in the panel opinion, there is simply no reason to jeopardize the educational opportunities provided by the scholarship tax credit law.

## CONCLUSION

For the reasons stated, Petitioners-Intervenors respectfully request that this Court grant their petition for writ of certiorari. The panel opinion is so clearly erroneous that it should be summarily reversed.

Respectfully submitted,

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**v.**

**ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION; ARIZONA SCHOOL CHOICE TRUST; LUIS MOSCOSO; GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue; GLENN DENNARD, Defendants-Appellees.**

**No. 05-15754**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

***562 F.3d 1002; 2009 U.S. App. LEXIS 8242***

**January 24, 2008, Argued and Submitted, Pasadena, California**

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**JUDGES:** Before: Dorothy W. Nelson, Stephen Reinhardt and Raymond C. Fisher, Circuit Judges. Opinion by Judge Fisher.

**OPINION BY:** Raymond C. Fisher

## OPINION

FISHER, Circuit Judge:

Arizona law grants income tax credits restricted to taxpayers who make contributions to nonprofit organizations that award private school scholarships to children. Plaintiffs, certain Arizona taxpayers, allege that some of the organizations funded under this program restrict the availability of their scholarships to religious schools, and that the program in effect deprives parents, the program's aid recipients, of a genuine choice between selecting scholarships to private secular schools or religious ones. We conclude that the plaintiffs' complaint, which at this stage of the litigation we must view in the light most favorable to the plaintiffs, sufficiently alleges that Arizona's tax-credit funded scholarship program lacks religious neutrality and true private choice in making

scholarships available to parents. Although scholarship aid is allocated partially through the individual choices of Arizona taxpayers, overall the program in practice "carries with it the *imprimatur* of government endorsement." *Zelman v. Simmons-Harris*, 536 U.S. 639, 655, 122 S. Ct. 2460, 153 L. Ed. 2d 604 (2002). We therefore hold, contrary to the district court, that plaintiffs' allegations, if accepted as true, are sufficient to state a claim that Arizona's private school scholarship tax credit program, as applied, violates the Establishment Clause of the United States Constitution.

## BACKGROUND

Plaintiffs allege that Arizona's Revised Statute § 43-1089 ("Section 1089"), as applied, violates the Establishment Clause of the First Amendment. Section 1089, first enacted by the Arizona legislature in 1997, gives individual taxpayers a dollar-for-dollar tax credit for contributions to "school tuition organizations" ("STOs").[1] A STO is a private nonprofit organization that allocates at least 90 percent of its funds to tuition grants or scholarships for students enrolled in "a nongovernmental primary or secondary school or a preschool for handicapped students" within the state. Ariz. Rev. Stat. Ann. § 43-1089(G)(2)-(3)

[1] A parallel statute, which plaintiffs do not challenge in this action, gives corporations a dollar-for-dollar tax credit for contributions to STOs. *See* Ariz. Rev. Stat. § 43-1183.

(2005).[2] STOs may not provide scholarships to schools that "discriminate on the basis of race, color, handicap, familial status or national origin," but nothing in the statute precludes STOs from funding scholarships to schools that provide religious instruction or that give admissions preferences on the basis of religious affiliation. *Id.* § 1089(G)(2). Individual taxpayers can claim a tax credit of up to $500 for such contributions and married couples filing jointly can claim a credit of up to $1,000, provided the allowable tax credit does not exceed the taxes otherwise due. *Id.* § 1089(A)-(B). Taxpayers may designate their contribution to a STO that agrees to provide a scholarship to benefit a particular child, so long as the child is not the taxpayer's own dependent. *Id.* § 1089(E). The tax credit is available to all taxpayers in Arizona, regardless of whether they are parents of school-age children or pay any private school tuition themselves.

Section 1089 requires STOs to provide scholarships or tuition grants to children "to allow them to attend *any* qualified school of their parents' choice," but also states that STOs may not provide scholarships while "limiting availability to only students of one school." *Id.* § 1089(G)(3) (emphasis added). On its face, then, Section 1089 could have been interpreted

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[2] Hereinafter, all cites to "Section 1089" refer to Arizona Revised Statute Annotated § 43-1089 (2005). Any differences between this current version of Section 1089 and the version in place as of February 2000, when plaintiffs' complaint was filed, are not significant for the purposes of our analysis.

to require all STOs to provide scholarships to any qualified private school in the state, or to permit STOs to provide scholarships to a limited set of schools, so long as that set was greater than one. In practice, plaintiffs allege, many STOs have opted to limit the schools to which they offer scholarships, and a number of STOs provide scholarships that may be used only at religious schools or schools of a particular denomination. For example, plaintiffs allege that Arizona's three largest STOs, as measured by the amount of contributions reported in 1998, each restricts its scholarships to use at religious schools. The largest of these, the Catholic Tuition Organization of the Diocese of Phoenix, restricts its scholarships to use at Catholic schools in the Phoenix Diocese such as St. Mary's, which advertises its mission as being "to provide a quality Catholic education by developing and sustaining a rich tradition grounded in Gospel and family values." The second largest STO, the Arizona Christian School Tuition Organization, expressly restricts scholarships to use at "evangelical" Christian Schools. The third largest, Brophy Community Foundation, restricts its scholarships to use at two Catholic schools, one of which advertises its goal to be "instill[ing] a knowledge of the truths of faith, enlightened by the post-Conciliar teachings of the Church," and the other of which promotes itself as offering students "an intimate relationship with God" through "the process of nurturing the soul."

Arizona does not specify scholarship eligibility criteria or dictate how STOs choose the students who

receive scholarships, and STO-provided scholarships therefore vary considerably. Although STOs may choose to award scholarships primarily based on financial need, Section 1089 does not require it. The availability of scholarships to particular students and particular schools thus depends on the amount of funding a STO receives, the range of schools to which it offers scholarships and the STO's own scholarship allocation decisions and eligibility criteria. Therefore, plaintiffs allege, because the largest STOs restrict their scholarships to sectarian schools, students who wish to attend non-religious private schools are disadvantaged in terms of the STO-provided scholarships available to them. Thus, plaintiffs argue, the disparities in the availability and amount of scholarships for use at religious and secular schools show that the structure of Section 1089, as applied, favors religious over secular schools, and thereby violates the Establishment Clause.

Before Section 1089 became operative, the Arizona Supreme Court, based on its construction of the statute, held that it did not on its face violate the Establishment Clause or provisions of the Arizona state constitution. *See Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (Ariz. 1999) (en banc).[3] After the

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[3] Significantly, in rejecting the facial challenge, the Arizona Supreme Court interpreted Section 1089 to require that "[e]very STO must allow its scholarship recipients to 'attend any qualified school of their parents' choice,' and may not limit grants to students of only one such institution." *Id.* at 614 (quoting Ariz. Rev. Stat. Ann. § 43-1089(E)(2) (2005) (emphasis added)).

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statute took effect, different plaintiffs filed this suit against the Director of Arizona's Department of Revenue in the United States District Court for the District of Arizona.[4] Plaintiffs do not contest the facial validity of Section 1089, but rather assert that it violates the Establishment Clause as applied.[5] The district court dismissed the suit as barred by the Tax Injunction Act. *See Winn v. Killian*, 307 F.3d 1011, 1013 (9th Cir. 2002). We reversed the dismissal, *see id.* at 1020, and the Supreme Court affirmed our decision. *See Hibbs v. Winn*, 542 U.S. 88, 112, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004). On remand, the district court allowed two STOs, the Arizona Christian School Tuition Organization ("ACSTO") and Arizona School Choice Trust ("ASCT"), and two parents of ASCT scholarship recipients, Glenn Dennard and Luis Moscoso, to intervene as defendants. ACSTO provides scholarships only to religious schools and the ASCT provides scholarships to any private school of the

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"Thus," the Arizona Supreme Court concluded, "schools are no more than indirect recipients of taxpayer contributions, with the final destination of these funds being determined by individual parents." *Id.* Because plaintiffs in this action allege that, in practice, Section 1089 permits STOs to restrict the use of their scholarships to *certain* schools, the structure of the program as applied is notably different from the program's structure as it was considered in *Kotterman*.

[4] Current Director Gale Garriott has since replaced former Director Mark Killian as the named defendant.

[5] Plaintiffs' complaint alleged that Section 1089 is invalid both on its face and as applied, but they have since abandoned their facial challenge.

parents' choice.[6] Defendants again moved to dismiss, contending that plaintiffs lacked standing, that the suit was barred by res judicata and that plaintiffs had failed to state a claim under the Establishment Clause. The district court granted defendants' motion to dismiss for failure to state a claim and plaintiffs appealed. We have jurisdiction under 28 U.S.C. § 1291 and we reverse and remand for further proceedings.

## STANDARD OF REVIEW

We review the district court's dismissal for failure to state a claim de novo, "accept[ing] all factual allegations in the complaint as true and construe[ing] the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). We affirm the district court "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Enesco Corp. v. Price/Costco, Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998) (internal quotation marks omitted). "Standing is a question of law that we review de novo." *Salmon Spawning &*

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[6] We use the term "defendants" to refer to the Director of Arizona's Department of Revenue and the intervening defendants ACSTO, ASCT, Dennard and Moscoso. We use the term "defendant-intervenors" when referring only to the intervening defendants. At oral argument, plaintiffs stipulated that they challenge only those STOs that restrict scholarships to religious schools, and thus we note that ASCT is not being directly challenged.

*Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1224 (9th Cir. 2008).

## ANALYSIS

### I. Taxpayer Standing

Plaintiffs' only allegation of injury from the allegedly unconstitutional operation of Section 1089 arises from their status as Arizona taxpayers. It is well established that individuals do not generally have standing to challenge governmental spending solely because they are taxpayers, because "it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 127 S. Ct. 2553, 2559, 168 L. Ed. 2d 424 (2007) (plurality opinion). This rule applies with equal force to taxpayer suits challenging an allegedly unconstitutional state action and those challenging federal action. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342-49, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006); *Arakaki v. Lingle*, 477 F.3d 1048, 1062-63 (9th Cir. 2007). The Supreme Court, however, has long recognized "a narrow exception to the general constitutional prohibition against taxpayer standing" when a plaintiff contends that a use of funds violates the Establishment Clause. *Hein*, 127 S. Ct. at 2564; *see Flast v. Cohen*, 392 U.S. 83, 88, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968). Because plaintiffs have alleged that the state has used its taxing and spending power to advance

religion in violation of the Establishment Clause, we hold that they have standing under Article III to challenge the application of Section 1089.

As the Supreme Court recently reaffirmed, the *Flast* exception to the general bar against taxpayer standing is rooted "in the history of the Establishment Clause" and is designed to prevent "'the specific evils feared by [its drafters] that the taxing and spending power would be used to favor one religion over another or to support religion in general.'" *DaimlerChrysler*, 547 U.S. at 348 (alterations in original) (quoting *Flast*, 392 U.S. at 103). The exception recognizes that the "injury" alleged in Establishment Clause challenges to governmental spending arises not from the effect of the challenged program on the plaintiffs' own tax burdens, but from "the very 'extract[ion] and spend[ing]' of 'tax money' in aid of religion." *Id.* (alterations in original) (quoting *Flast*, 392 U.S. at 106). Therefore, to satisfy the *Flast* test for taxpayer standing, plaintiffs need not show that an injunction against a particular taxing or spending program would cause "lawmakers . . . [to] dispose of the savings in a way that would benefit the taxpayer-plaintiffs personally." *Id.* at 348-49. Instead, they need only show that the program challenged involves "a sufficient nexus between the taxpayer's standing as a taxpayer and the . . . [legislative] exercise of taxing and spending power." *Bowen v. Kendrick*, 487 U.S. 589, 620, 108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988).

Section 1089 gives Arizona taxpayers a tax credit for amounts they donate to STOs, up to the statutory cap of $500 for individuals or $1,000 for married couples filing jointly or the taxpayers' entire state tax liability. *See* Ariz. Rev. Stat. Ann. § 43-1089(A), (C). Tax credits are deducted *after* taxpayers' tax liability has been calculated, thereby giving taxpayers dollar-for-dollar "credits" against their state taxes for sums paid to STOs. Tax credits therefore operate differently from tax deductions; whereas tax deductions allow taxpayers only to reduce their income subject to taxation, tax credits allow individuals to make payments to a third party *in satisfaction* of their assessed tax burden. As the Supreme Court explained, "[i]n effect, § 43-1089 gives Arizona taxpayers an election" to direct a portion of the money they owe the state to either a STO or to the Arizona Department of Revenue. *Hibbs*, 542 U.S. at 95. Accordingly, "[a]s long as donors do not give STOs more than their total tax liability, their . . . contributions are costless." *Id.* Tax credits are therefore a powerful legislative device for directing money to private organizations.[7]

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[7] Section 1089's success is evident from the year-over-year increases in contributions since the program took effect. Plaintiffs allege that taxpayers claimed $1.8 million in credits for contributions to STOs in 1998, when the program was under legal challenge that made it unclear whether donors would receive the credit, and over $5.9 million in 1999. According to data on the Arizona Department of Revenue's public website, these contributions appear to have further increased since the filing of plaintiffs' complaint, with taxpayers claiming credits

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Defendant-intervenors argue that plaintiffs do not have standing to challenge Section 1089 even under the *Flast* exception, because the money directed by taxpayers to STOs under the tax credit program does not pass through the state treasury and therefore the program cannot be characterized as involving any "expenditure" of public funds.[8] The Supreme Court has recognized, however, that state tax policies such as tax deductions, tax exemptions and tax credits are means of "channeling . . . [state] assistance" to private organizations, which can have "an economic effect comparable to that of aid given directly" to the organization. *Mueller v. Allen*, 463 U.S. 388, 399, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983). The Court has therefore refused to make artificial distinctions between direct grants to religious

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worth over $54 million in 2007. *See* Arizona Department of Revenue Office of Economic Research & Analysis, Individual Income Tax Credit for Donations to Private School Tuition Organizations, 2007, at 3 (April 1, 2008), *available at* http://www.revenue.state.az.us/ResearchStats/private_schl_credit_report_2007.pdf (last visited April 13, 2009).

[8] ACSTO's argument that our reasoning is bound by *Kotterman's* conclusion that the tax credit does not constitute an "appropriation of public money" within the meaning of the Article II, Section 12 and Article IX, Section 10 of the Arizona constitution, *see* 972 P.2d at 617-21, is meritless. The Arizona Supreme Court's holding has no bearing on our analysis of plaintiffs' standing in federal court, which turns on the requirements derived from Article III of the U.S. Constitution. *Cf. Hein*, 127 S. Ct. at 2562 ("One of the controlling elements in the definition of a case or controversy under Article III is standing.") (internal quotation marks and alterations omitted).

organizations and tax programs that confer special benefits on religious organizations, particularly tax credits such as the one challenged here. As the Court noted, "for purposes of determining whether such aid has the effect of advancing religion," it makes no difference whether the qualifying individual "receives an actual cash payment . . . [or] is allowed to reduce . . . the sum he would otherwise be obliged to pay over to the state." *Comm. for Pub. Educ. & Religious Liberty v. Nyquist,* 413 U.S. 756, 790-91, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973). In either case, "the money involved represents a charge made upon the state for the purpose of religious education." *Id.* at 791 (internal quotation marks omitted); *see also Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 236, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987) (Scalia, J., dissenting) ("Our opinions have long recognized – in First Amendment contexts as elsewhere – the reality that tax exemptions, credits, and deductions are a form of subsidy that is administered through the tax system.") (internal quotation marks omitted). In effect, Section 1089 works the same as if the state had given each taxpayer a $500 check that can only be endorsed over to a STO or returned to the state. Because Section 1089 does not allow taxpayers to keep the money under any circumstance – and because it directs how the money will be spent if it is not surrendered to the state – we reject the suggestion that this money is not publicly subsidized simply because it does not pass through the treasury.

Nor does Section 1089 lack "a sufficient nexus between the taxpayer's standing as a taxpayer and the . . . [legislative] exercise of taxing and spending power" just because the Arizona legislature does not transfer money to STOs or religious schools directly. *See Bowen,* 487 U.S. at 620. The Arizona legislature promulgated Section 1089 under the power conferred by Article IX of the Arizona constitution, a provision that is equivalent to the U.S. Constitution's taxing and spending clause. *See* Ariz. Const. art. IX, § 3. By giving taxpayers a dollar-for-dollar credit for contributions to STOs and then requiring STOs to "allocate[ ] at least ninety percent of . . . [their] annual revenue for educational scholarships or tuition grants to children," the state legislature has provided only two ways for this money to be spent: taxpayers *will* either give the dollar to the state, or that dollar (or at least 90 percent of it, after allowable STO administrative expenses) will end up in scholarships for private school tuition. *See* Ariz. Rev. Stat. Ann. § 1089(G)(3) (2005).

By structuring the program as a dollar-for-dollar tax credit, the Arizona legislature has effectively created a grant program whereby the state legislature's funding of STOs is mediated through Arizona taxpayers. The Court has recognized that taxpayer standing exists even when a legislature does not directly allocate funds to religious organizations, but instead mediates the funds through another agency. *See Bowen,* 487 U.S. at 618-20. Although the Arizona legislature has chosen an alternative method of

allocating the funds that Section 1089 makes available to STOs, the Court clarified in *Bowen* that it was the legislature's exercise of its taxing and spending power, rather than the actions of the agency, that permitted taxpayers to raise an Establishment Clause challenge. *See id.* at 619 ("We do not think . . . that appellees' claim that . . . [appropriated] funds are being improperly used by individual grantees is any less a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by the Secretary [of Health and Human Services]."). Accordingly, under *Bowen*, taxpayers have standing to challenge a legislature's exercise of its taxing and spending power even when the legislature does not use that power to directly fund religious organizations, but instead uses the power to authorize third parties to fund such organizations.

Consistent with these principles, the Supreme Court has repeatedly decided Establishment Clause challenges brought by state taxpayers against state tax credit, tax deduction and tax exemption policies, without ever suggesting that such taxpayers lacked Article III standing. *See, e.g., Mueller,* 463 U.S. at 390 (state income tax deduction for school expenses that could be claimed for expenses at religious schools); *Nyquist,* 413 U.S. at 789-90 (hybrid state tax deduction-tax credit program for tuition paid to private schools); *Hunt v. McNair,* 413 U.S. 734, 737-38, 93 S. Ct. 2868, 37 L. Ed. 2d 923 (1973) (state tax exemption for state-issued revenue bonds that went in part

to religious schools); *Walz v. Tax Comm'n,* 397 U.S. 664, 666, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970) (state property tax exemption for religious nonprofit organizations). The Supreme Court has also repeatedly decided challenges brought by state taxpayers to indirect aid programs – where the ultimate decision to confer aid rested with a private individual and not the government – and again never suggested that taxpayers lacked standing. *See, e.g., Zelman,* 536 U.S. at 645 (state tuition grants to parents for public or private schools); *Nyquist,* 413 U.S. at 781 (state tuition grants to parents for private schools). Although we acknowledge that "the [c]ourt's exercise of jurisdiction . . . is not precedent for the existence of jurisdiction," *Doe v. Madison Sch. Dist. No. 321,* 177 F.3d 789, 795 (9th Cir. 1999) (en banc) (internal quotation marks omitted; alteration in original), we also note that the Court has rejected the suggestion that its consistent past practice of exercising jurisdiction amounts to "mere 'sub silentio holdings'" that "command no respect," *Hibbs,* 542 U.S. at 94. We therefore hold that plaintiffs have standing as taxpayers to challenge Section 1089 for allegedly violating the Establishment Clause.

## II. The Establishment Clause

"The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws

that have the 'purpose' or 'effect' of advancing or inhibiting religion."[9] *Zelman*, 536 U.S. at 648-49

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[9] Defendants argue that plaintiffs' as-applied challenge is barred by "res judicata" in light of *Kotterman*. In *Hibbs v. Winn*, however, the Supreme Court observed that "*Kotterman*, it is undisputed, has no preclusive effect on the instant as-applied challenge to § 43-1089 brought by different plaintiffs." 542 U.S. at 95. Insofar as we are free to call this observation into question, we nonetheless find defendants' argument unpersuasive.

Under the full-faith-and-credit statute, 28 U.S.C. § 1738, "[w]e give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 688 (9th Cir. 2004) (internal quotation marks omitted). *Kotterman* upheld Section 1089 on a facial challenge before the statute was implemented. Plaintiffs allege that Section 1089 violates the Establishment Clause because STOs have not provided scholarships in a way that is neutral toward religion and that offers parents true private choice; this allegation is predicated on evidence that was not available prior to Section 1089's implementation. Plaintiffs' as-applied challenge thus does not, as defendants argue, implicate Arizona's doctrine of virtual representation. *See El Paso Natural Gas Co. v. State*, 123 Ariz. 219, 599 P.2d 175, 178 (Ariz. 1979). Arizona law bars cases under res judicata only where "*no additional evidence* is needed to prevail in the second action than that needed in the first." *Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 934 P.2d 801, 804 (Ariz. App. 1997) (emphasis added). In determining whether a program's secular purpose is genuine, and whether a program has the primary effect of advancing religion, we may consider additional evidence as to how the program operates in reality. *See, e.g., McCreary County, Ky. v. ACLU*, 545 U.S. 844, 862, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005) (holding the "implementation of the statute, or comparable official act" are relevant in examining a program's secular purpose (internal quotation marks omitted)). We therefore agree with the Supreme Court that "*Kotterman* . . . has no preclusive effect on the instant as-applied challenge. . . ." *Hibbs*, 542 U.S. at 95.

(citing *Agostini v. Felton*, 521 U.S. 203, 222-23, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)).

### A. Secular Purpose

The first prong of this standard requires us to consider whether the statute was "enacted for . . . [a] valid secular purpose." *Id.* at 649. "[A]lthough a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 864, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005).

The legislative history of Section 1089 shows that its primary sponsor's concern in introducing the bill was providing equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents. *See* Ariz. House of Rep. Comm. on Ways & Means, Minutes of Meeting, Tues. Jan. 21, 1997. Plaintiffs do not contest that this purpose, if genuine, is both secular and valid. Plaintiffs argue, however, that Section 1089's design and scope reveal this purpose to be a sham. Specifically, plaintiffs argue that Section 1089's operation shows that the program, which provides aid only to students who attend private schools, was enacted not to give low-income children a meaningful opportunity to attend those schools, but to advance the legislature's religious aims.

Plaintiffs are correct that the nature of a program's operation may, in some instances, reveal its ostensible purpose to be a sham. *See McCreary*, 545 U.S. at 862 (stating that, in some cases, "the government action itself bespoke the purpose" of a program that violated the Establishment Clause) (citing *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223-24, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963)). As the Court held in *McCreary*, the inquiry whether a program's putative purpose is genuine and "not merely secondary to a religious objective," *id.* at 864, is undertaken from the perspective of "an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *Id.* at 862 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000) (internal quotation marks omitted)). Plaintiffs' allegations concerning Section 1089's operation are therefore relevant to whether the program has a genuine secular purpose.

As we discussed above, for example, Section 1089 could, on its face, be interpreted to require each STO to provide scholarships for use at any qualified private school, religious or secular. Plaintiffs allege, however, that in practice STOs are permitted to restrict the use of their scholarships to use at certain religious schools. Such allegations, if proved, could belie defendants' claim that Section 1089 was enacted primarily to provide Arizona students with equal access to a wide range of schooling options.



of educational choices the STO-administered scholarship programs offer do not realistically include "obtain[ing] a scholarship and choos[ing] a nonreligious private school." *Zelman*, 536 U.S. at 655. Section 1089, as applied, thereby creates incentives that pressure these parents into accepting one of the scholarships that are readily available under the program for use at a religious school. Therefore, Section 1089, as applied, "fails to provide genuine opportunities for . . . parents to select secular educational options for their school-age children." *Id.*

### b. Taxpayer choice

Defendants argue that despite this failure, Section 1089 does not violate the Establishment Clause because it provides a tax credit to all Arizona *taxpayers*, without respect to religion, and gives taxpayers a genuine choice between directing their money to religious or secular STOs. Therefore, as *Zelman* requires, "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Id.* at 649. Plaintiffs

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not challenge, show that in 2004, the Arizona School Choice Trust – the largest of the STOs that provides scholarships to any private secular or religious school – reported a waiting list of at least 700 students. If accurate, it would be the kind of information that would further support plaintiffs' allegation that "parents choosing to send their children to non-religious, non-public schools may be unable to locate an STO willing and able to make a tuition grant to a student attending the non-religious school of the parents' choice."

At the same time, we are mindful of the Supreme Court's "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller*, 463 U.S. at 394-95. The Court has held that programs that direct benefits *exclusively* to private schools, as Section 1089 does, may be "adequately supported by legitimate, nonsectarian interests," including "promoting pluralism and diversity among [the state's] public and nonpublic schools." *Nyquist*, 413 U.S. at 773. The question before us, however, is not whether Section 1089 in fact has a genuine, secular purpose, but whether plaintiffs could prove, on the facts alleged in the complaint, that it does not. Accordingly, we conclude that plaintiffs' allegations, if accepted as true, leave open the possibility that plaintiffs could reveal the legislature's stated purpose in enacting Section 1089 to be a pretense.

### B. Effect

We next consider whether Section 1089 "has the forbidden 'effect' of advancing or inhibiting religion." *Zelman*, 536 U.S. at 649. In "refin[ing] the definition of governmental action that unconstitutionally advances religion," the Supreme Court has "paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence." *County of Allegheny v. ACLU*, 492 U.S. 573, 592, 109

S. Ct. 3086, 106 L. Ed. 2d 472 (1989). Guided by the Court's opinion in *Zelman*, we conclude, for reasons set forth below, that plaintiffs have alleged facts sufficient to state an as-applied Establishment Clause claim under this endorsement test.

Section 1089 is an indirect aid program, under which the state gives tax credits to individuals who contribute to STOs, which in turn use the money to provide private school scholarships. Plaintiffs allege that many of these STOs in fact exist to promote the funding of religious education. If the state of Arizona were to allocate funds directly to these religious STOs, the state would plainly violate the Establishment Clause. *See Bowen*, 487 U.S. at 609-10 (noting that "direct government aid" impermissibly advances religion "if the aid flows to institutions that are 'pervasively sectarian'"). As defendants correctly argue, however, STOs are private charitable organizations – albeit funded by taxpayer contributions that the state will reimburse through dollar-for-dollar tax credits.[10]

We nevertheless hold that if plaintiffs' allegations are accepted as true, Section 1089 violates the Establishment Clause by delegating to taxpayers a choice that, from the perspective of the program's aid recipients, "deliberately skew[s] incentives toward religious schools." *Zelman*, 536 U.S. at 650; *see id.* at

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[10] Plaintiffs do not argue that STOs are state actors, so we do not decide whether the STOs' conduct, in itself, could support an Establishment Clause claim.

652 (emphasizing that in the educational assistance programs the Court has upheld, "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits"). In practice, plaintiffs allege, the choice delegated to taxpayers under Section 1089 channels a disproportionate amount of government aid to sectarian STOs, which in turn limit their scholarships to use at religious schools.[11] The scholarship program thus skews aid in favor of religious schools, requiring parents who would prefer a secular private school but who cannot obtain aid from the few available nonsectarian STOs to choose a religious school to obtain the perceived benefits of a private school education. Accordingly, Section 1089's delegation to taxpayers operates to deprive these parents, as the program's aid recipients, of "'genuinely independent and private choices'" to direct the program aid to secular schools. *Id.* at 651 (quoting *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487, 106 S. Ct. 748, 88

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[11] This allegation is distinct from plaintiffs' contention that Section 1089's design reveals its putative secular purpose to be a sham. As we shall discuss below, the Supreme Court has frequently held that state policies enacted for a valid secular purpose violate the Establishment Clause when they are not effectively designed to achieve that purpose. *See, e.g., Nyquist*, 413 U.S. at 788 ("In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one 'advancing' religion.").

L. Ed. 2d 846 (1986)). Unlike indirect aid programs the Supreme Court has upheld, Section 1089 is not a "neutral program of private choice," and a reasonable observer could therefore conclude that the aid reaching religious schools under this program "carries with it the *imprimatur* of government endorsement." *Id.* at 655.

Defendants dispute this conclusion on two grounds: First, that as private institutions who do not receive direct government funding, they are no different from other nonprofit, religious institutions that are funded through tax-deductible contributions. Second, that under the program, "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649. We address each of these arguments in turn.

### 1. Aid to Private Institutions

Defendants first argue that because STOs do not receive direct government funding, Section 1089 is no different from other programs that accord tax benefits to individuals who contribute to nonprofit, religious institutions. *See, e.g., Hernandez v. Comm'r*, 490 U.S. 680, 695, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989) (upholding federal tax deduction for contributions to charitable and religious organizations); *see also Walz*, 397 U.S. at 666-67 (upholding state property tax exemption for religious and secular nonprofit organizations). As with any program of government

aid, however, whether such programs violate the Establishment Clause depends on whether they have "either ... the purpose or effect of 'endorsing' religion." *County of Allegheny*, 492 U.S. at 592; *see Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989) (plurality opinion) (holding sales tax exemption exclusively available to religious periodicals violated Establishment Clause because it "lack[ed] a secular objective that would justify this preference along with similar benefits for nonreligious publications or groups, and because it effectively endorses religious belief"); *Nyquist*, 413 U.S. at 783 (holding program including grants and tax deductions for private school tuition had valid secular purpose, but violated Establishment Clause because "the effect of the aid [wa]s unmistakably to provide desired financial support for nonpublic, sectarian organizations"). The parallels defendants contend exist between Section 1089 and tax deduction programs that the Supreme Court has held "easily pass[ ] constitutional muster," *Hernandez*, 490 U.S. at 695, are therefore instructive, but only to the extent they shed light on the secular objectives, if any, that Section 1089 was enacted to promote.

The secular objectives defendants argue Section 1089 promotes differ significantly from those advanced by tax deduction programs the Supreme Court has upheld. The federal system addressed in *Hernandez*, for example, permits tax deductions for "any charitable contribution" to a qualified entity "organized and operated exclusively for religious, charitable,

scientific, literary, or educational purposes, or to foster national or international amateur sports competition." 26 U.S.C. §§ 170(a), (c)(2)(B); *see also Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983) (observing Congress' system of tax deductions and exemptions provides "subsidy to non profit civic welfare organizations generally"). This system, the Court held, makes deductions available for contributions to an array of religious and secular organizations, and thus has "the primary effect of . . . encouraging gifts to charitable entities, including but not limited to religious organizations." *Hernandez*, 490 U.S. at 696. Section 1089, by contrast, offers narrowly targeted, dollar-for-dollar tax credits designed to fully reimburse contributions to STOs, most of which restrict recipients' choices about how to use their scholarships. Although defendants contend these credits were enacted to provide Arizona schoolchildren equal access to a wide range of schooling options, defendants do not – and could not – suggest the credits are designed to promote donations of individual wealth or charitable giving to a broad array of institutions.[12]

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[12] As the Court recognized in *Hernandez*, 490 U.S. at 696, tax deductions promote the secular purpose of encouraging individuals to use their own private wealth to make charitable gifts. By contrast, the one-to-one tax credits offered under Section 1089 encourage individuals to give money to private STOs, but allow them to obtain full reimbursement from the state for their contributions. *See Nyquist*, 413 U.S. at 789 (explaining that "the usual attribute of a tax credit" is that it is "designed to yield a predetermined amount of tax 'forgiveness' in

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Likewise, defendants do not suggest that Section 1089 has a secular purpose in common with laws granting tax exemptions to a broad range of nonprofit organizations, including churches. *See Walz*, 397 U.S. at 672-75 (holding law granting property tax exemptions to array of religious and secular nonprofit institutions served to promote "beneficial and stabilizing influences in community life" and minimize "[t]he hazards of churches supporting government"); *see also id.* at 678 (noting the "unbroken practice of according . . . exemption[s] to churches, openly and by

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exchange for performing a specific act which the State desires to encourage"). In this respect, the tax credits offered under Section 1089 resemble those that encourage individuals to provide public financing for the Federal Election Commission's Presidential Election Campaign Fund ("PECF") but which do not, by design, encourage private charitable donations to the PECF. *See* 26 U.S.C. §§ 9001-13. As we explained in our prior opinion in this litigation:

> a tax credit differs from a tax deduction in that where a tax deduction is involved, giving money to a religious institution is not, as is the case of a tax credit, a free gift. In the case of a tax credit, the taxes due are reduced by the full amount of the gift. In contrast, when a taxpayer is entitled to a tax deduction, the taxpayer must in most if not all instances still pay a majority of the tax involved: it is only his taxable income that is reduced by the amount of the gift, and, thus, his tax liability is reduced only by a percentage of the gift that is equal to the tax rate applicable to his income bracket.

*Winn v. Killian*, 307 F.3d at 1015 n.5, *aff'd Hibbs v. Winn*, 542 U.S. 88, 124 S. Ct. 2276, 159 L. Ed. 2d 172. The tax credits offered under Section 1089 therefore do not promote the same secular purpose as the tax deductions upheld in *Hernandez*.

affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside"). Thus, we are not persuaded that Section 1089 conforms with the Establishment Clause simply because it bears some superficial resemblance to programs that do.

### 2. Private Choice

The Supreme Court has "drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649 (citations omitted). Defendants argue that Section 1089, like other religiously neutral educational assistance programs the Supreme Court has found constitutional, is a "program of true private choice . . . and [is] thus constitutional." *Id.* at 653.

The nature of the choices provided under Section 1089, however, differs significantly in structure from those under educational assistance programs the Court has held to be "programs of true private choice."[13] *Id.* In each of those programs, the

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[13] *See Zelman*, 536 U.S. 639, 122 S. Ct. 2460, 153 L. Ed. 2d 604; *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 113 S. Ct. 2462, 125 L. Ed. 2d 1 (1993) (upholding federal program providing sign-language interpreter to student attending Catholic school); *Witters*, 474 U.S. 481, 106 S. Ct. 748, 88 L. Ed. 2d 846 (upholding state vocational assistance program paying state aid

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government "provid[ed] assistance directly" to parents or individual students, "who, in turn, direct[ed] the government aid to religious schools wholly as a result of their own genuine and independent private choice." *Id.* at 652. Under the voucher program upheld in *Zelman,* for example, the state distributed tuition aid directly to eligible parents, who were free to use the aid to send their children to any participating public or private school, and those wishing their children to remain enrolled in public school received tutorial aid to accommodate that choice. *Id.* at 645.

Under Section 1089, by contrast, the state does not provide aid directly to parents. Instead the aid is mediated first through taxpayers, and then through private scholarship programs. Under Section 1089, all Arizona taxpayers are eligible for a tuition tax credit, and those whose tax liability is large enough to use the credit may apply it toward a contribution to any STO, regardless of whether that STO provides scholarships exclusively for use at religious schools. In turn, any Arizona parent who wishes to send her child to a private school may apply for a STO scholarship, provided that the child meets the STO's eligibility criteria for the use of that scholarship.

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directly to student attending religious college); *Mueller,* 463 U.S. 388, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (upholding state tax deduction available to parents for their children's public and private school expenses).

Unlike parents' choices under the program in *Zelman,* or aid recipients' choices under other programs the Court has upheld, parents' choices are constrained by those of the taxpayers exercising the discretion granted by Section 1089. For example, by choosing to give state-reimbursed money to the Catholic Tuition Organization of the Diocese of Phoenix, which plaintiffs allege to be the largest STO, taxpayers can make their portion of the program aid available only to parents who are willing to send their children to Catholic schools. Although anyone may form a new STO devoted to funding scholarships at secular private schools, Section 1089 prohibits taxpayers from earmarking contributions for their own children. Thus, it is taxpayers who decide which STOs to fund and, consequently, who is eligible to receive STO-provided scholarships according to the criteria of the designated STO.

Defendants acknowledge the differences between parents' choices under Section 1089 and those afforded under indirect aid programs that the Supreme Court has previously upheld. They contend, however, that because Section 1089 offers "genuine and independent choices" to the taxpayers who fund STOs, these differences are irrelevant to whether Section 1089 violates the Establishment Clause. We disagree.

### a. Parental choice

The parties do not contest that notwithstanding its structural differences from indirect aid programs

the Court has upheld, Section 1089 would satisfy the Establishment Clause if the program made scholarships available to parents on a religiously neutral basis and gave them a true private choice as to where to utilize the scholarships. Plaintiffs allege, however, this is not how the program works in practice. In *Zelman,* the Court identified several circumstances relevant to whether the indirect aid program at issue, which gave tuition grants to parents to apply toward private and fee-charging public schools, was "a program of true private choice . . . and thus constitutional[:]"

> [T]he . . . program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking . . . to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i.e.,* any parent of a school-age child who resides in the . . . School District. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. *Program benefits are available to participating families on neutral terms, with no reference to religion.* The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools.

> There are *no financial incentives that skew the program toward religious schools.* Such incentives are not present . . . where the aid is *allocated on the basis of neutral, secular criteria* that neither favor nor disfavor religion, and *is made available to both religious and secular beneficiaries on a nondiscriminatory basis.*

*Id.* at 653-54 (emphasis added) (citations, alterations and internal quotation marks omitted).

Under this rubric, Section 1089 falls short. The vast majority of the scholarship money under the program – over 85 percent as of the time of plaintiffs' complaint – is available only for use at religious schools.[14] Because this aid is available only to parents who are willing to send their children to a religious school, the program fails to "confer[ ] educational assistance directly to a broad class of individuals

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[14] We recognize the Supreme Court in *Mueller*, 463 U.S. at 401, cautioned that such statistics lack constitutional import when a law is facially neutral. This case is different from *Mueller*, however, because Section 1089 does not allocate scholarship funds based on *parents'* choices of schools, but instead mediates financial aid through *taxpayers'* allocations to scholarship programs of their choice. As a result, a parent seeking scholarship aid does not have a "genuine and independent private choice" under the program because the parent's choices are constrained by those of taxpayers. *Zelman*, 536 U.S. at 652. Facts showing the skewed concentration of funds in sectarian school scholarship programs would therefore support the claim that parents are financially incentivized to choose a religious school.

defined without reference to religion." *Id.* at 653. Moreover, because a disproportionate amount of the program aid is ear-marked for use at religious schools *before* parents receive the aid, Section 1089 is not, from the parents' perspective, "neutral in all respects toward religion" and does not equally "permit[ ] the participation of *all* schools . . . religious or non-religious" in the program. *Id.* Additionally, because Section 1089 does not make aid equally available to parents "on the basis of neutral, secular criteria that neither favor nor disfavor religion," *id.* (alterations in original) (quoting *Witters*, 474 U.S. at 487-88), the program creates "'financial incentive[s]'" for parents that "'ske[w]' the program toward religious schools." *Id.* (quoting *Witters*, 474 U.S. at 487-88); *see Zobrest*, 509 U.S. at 10 (upholding program because it "create[d] no financial incentive for parents to choose a sectarian school"). Thus, parents who wish to place their children in a private secular school, but who could not otherwise afford to do so, are at a disadvantage compared to parents who are willing to accept a scholarship for private religious schooling – either by choice or out of financial necessity. Although parents would, of course, have the option of leaving their children in public school, we reject the suggestion that the mere existence of the public school system guarantees that any scholarship program provides for genuine private choice. For parents wait-listed for scholarships to secular schools,[15] the range

[15] Data in the record, the veracity of which defendants do

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do not contest that Section 1089 is neutral with respect to the taxpayers who direct money to STOs, or that any of the program's aid that reaches a STO does so only as a result of the genuine and independent choice of an Arizona taxpayer. *See Mueller*, 463 U.S. at 398-99. Plaintiffs argue, however, that Section 1089 violates the Establishment Clause precisely *because* the individual taxpayers' choices available under the program serve to restrict parents' opportunities to select secular educational options for their school-age children, skewing parents' incentives to send their children to religious schools. As such, the program is not "neutral in all respects toward religion" and, concomitantly, is not a "program of true private choice." *Zelman*, 536 U.S. at 653.

Defendants argue that it is irrelevant, under *Zelman*, whether an indirect aid program offers true private choice to parents, or instead, like Section 1089, offers true private choice to another broadly defined class of individuals. In describing what constitutes "true private choice," however, the Court in *Zelman* frequently emphasized that the choice is one offered, on a neutral basis, to *parents* or *students*, as the beneficiaries of the program's aid. *See, e.g., id.* at 652 ("A program . . . [like those the Court has upheld] permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients."); *id.* at 653 (concluding one of the features of "true private choice" in the Ohio voucher program is that "[p]rogram benefits are available to participating families on neutral

terms"); *id.* at 669 (O'Connor, J., concurring) ("Courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice among religious and non-religious organizations when determining the organization to which they will direct that aid."). Defendants contend this emphasis is simply because parental choice was the *only* private choice offered under those programs.

Defendants' argument, however, disregards the Court's analysis of *how* the true private choice described in *Zelman* ensures that government aid flowing to religious institutions does not have "the forbidden 'effect' of advancing . . . religion,'" *id.* at 649, even though the aid would have such an effect under a program of direct funding. *See Bowen*, 487 U.S. at 609-10 (noting "direct government aid" impermissibly advances religion "if the aid flows to institutions that are 'pervasively sectarian'"). The function of true private choice, the Court explained, is to eliminate the perception that the government is endorsing religion through the money that is channeled to sectarian institutions: "The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Zelman*, 536 U.S. at 652. The Court

expressly linked its "true private choice" analysis to the "reasonable observer" inquiry as to whether the government is perceived to endorse the religious organizations that benefit from its aid. *See id.* at 655 (holding, with respect to the parental choice the Court was addressing, that "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement").

In drawing this link, the Court adopted Justice O'Connor's position in *Mitchell v. Helms*, 530 U.S. 793, 120 S. Ct. 2530, 147 L. Ed. 2d 660 (2000), that "'[i]n terms of public perception, a government program of direct aid to religious schools . . . differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools.'" *Zelman*, 536 U.S. at 655 (quoting *Mitchell*, 530 U.S. at 842-43 (O'Connor, J., concurring in judgment)). Under this framework, the question central to the endorsement inquiry is whether "the reasonable observer would naturally perceive the aid program [in question] as *government* support for the advancement of religion." *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring in the judgment) (discussing effect of programs providing direct aid to religious schools). "'[T]he reasonable observer in th[is] endorsement inquiry must be deemed aware' of the 'history and context' underlying a challenged program." *Zelman*, 536 U.S. at 655

(quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001) (internal quotation marks omitted)); *see also Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 773, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (O'Connor, J., concurring in part and concurring in judgment) ("[T]he endorsement test necessarily focuses upon the perception of a reasonable, *informed* observer.") (emphasis added). We impute this knowledge to the reasonable observer because "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from . . . discomfort," but instead concerns "the political community writ large." *Id.* at 779; *accord Good News Club*, 533 U.S. at 119 (adopting this position); *see also Capitol Square*, 515 U.S. at 779-80 (O'Connor, J., concurring in part and concurring in judgment) ("[T]he applicable observer is similar to the 'reasonable person' in tort law, who is not to be identified with any ordinary individual, who might occasionally do unreasonable things, but is rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.") (internal quotation marks omitted; alteration in original).

Accordingly, to assess whether the taxpayer choice offered under Section 1089 has the same constitutional effect as the parental choice *Zelman* upheld, we must consider the Court's application of the reasonable observer inquiry to the program at issue in that case. Specifically, we must consider the

circumstances the Court deemed relevant to *why* a reasonable, informed observer looking at the program upheld in *Zelman* would conclude that "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message" resulting from a program "is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." 536 U.S. at 652. The Court's guidance in earlier cases also sheds light on two circumstances that seemed particularly important to the reasonable observer analysis in *Zelman*.

First, a reasonable, informed observer would consider what role the person making the choice occupies in the structure of the program. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127, 103 S. Ct. 505, 74 L. Ed. 2d 297 (1982) (holding statute allowing a church or school to veto a liquor license for establishments in their proximity violated the Establishment Clause); *Zelman*, 536 U.S. at 652. In *Larkin*, the Court determined there was no "'effective means of guaranteeing'" the veto power delegated to churches over liquor licenses "'[would] be used exclusively for secular, neutral, and nonideological purposes.'" *Id.* at 125 (quoting *Nyquist*, 413 U.S. at 780).[16] "In addition,"

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[16] In *Zelman*, the Court held "*Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion." 536 U.S. at 662. As discussed above, Section 1089 does not "offer aid directly to individual recipients," but rather mediates the aid through taxpayers

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the Court continued, "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Id.* at 125-26. Of course, the delegation of scholarship funding to individual taxpayers, such as in Section 1089, does less to promote religion than the delegation of zoning authority to churches. *Larkin's* holding, however, illustrates that when a statute delegates "a power ordinarily vested in agencies of government" to a private party, *see id.* at 122, without reasonable assurance that the party's choices will advance the secular purposes of the statute, any ensuing "perceived endorsement of a religious message" may be "reasonably attribut[ed]" to the government. *See Zelman*, 536 U.S. at 652.

By contrast, the educational assistance programs addressed in *Zelman* were structured so that parents were permitted to choose how to best use the program aid to assist *their* children. The parents' decisive role in the program gave them incentives to apply the program's aid based on their children's educational interests instead of on sectarian considerations, such as whether to promote the religious mission of a particular school. Accordingly, by delegating a choice

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and STOs. Insofar as Section 1089 is not a "program of true private choice," within the meaning of *Zelman*, the Court's holding in *Nyquist* is relevant to determining whether a reasonable observer would conclude the tax credit program endorses religion.

that "ensured that parents were the ones to select a religious school as the best learning environment" for their children, the government did not appear to endorse religion. *Id.* (stating how federal special education program providing sign-language interpreter to student attending Catholic school ensured that "the circuit between government and religion was broken, and the Establishment Clause was not implicated").

Second, a reasonable, informed observer would consider whether the choice delegated under a program has the effect of promoting, or hindering, the program's secular purpose. *See id.* at 655. In *Larkin*, the Court recognized that the statute delegating veto power to churches and schools had the valid secular purpose of "protect[ing] spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets." 459 U.S. at 123 (internal quotation marks omitted). The Court noted, however, that "these valid secular objectives can be readily accomplished by other means," *id.* at 123-24, and that the veto power conferred by the statute could "be used by churches to promote goals beyond insulating the church from undesirable neighbors," *id.* at 125. The Court concluded that the delegation could "be seen as having a 'primary' and 'principal' effect of advancing religion." *Id.* at 126. Similarly, in *Nyquist*, the Court invalidated a program providing tuition grants and tax credits to parents sending their children to private schools because, although the program had a valid secular purpose, "the effect of the aid [wa]s

unmistakably to provide desired financial support for nonpublic, sectarian institutions." 413 U.S. at 783; *see id.* at 788 ("In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one 'advancing' religion."). *Nyquist* illustrates that if an educational assistance program provides individual choice through tax credits, but those tax credits hinder the program's ability to achieve its valid secular goals, a reasonable observer could well conclude that the tax credits are simply masking an Establishment Clause violation. *Cf. Hibbs v. Winn*, 542 U.S. at 93-94 (discussing school desegregation cases invalidating use of tuition grants and tax credits to circumvent *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954)); *see also Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 690, 114 S. Ct. 2481, 129 L. Ed. 2d 546 (1994) (invalidating statute creating school district coextensive with religious community that had valid purpose of providing special education services, but was unnecessarily tailored to promote sectarian aims); *Norwood v. Harrison*, 413 U.S. 455, 465, 93 S. Ct. 2804, 37 L. Ed. 2d 723 (1973) ("[I]t is . . . axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.") (internal quotation marks omitted) (invalidating state program providing textbooks to racially discriminatory private schools).

The choices delegated to parents under *Zelman*, by contrast, may have advanced – and at least did not thwart – the secular purpose of the program, which was to "provid[e] educational assistance to poor children in a demonstrably failing public school system." 536 U.S. at 649. The best educational environment for a particular child within a failed school system may depend on qualitative considerations that could not easily be assessed at a policymaking level. *See, e.g., id.* at 674-75 (O'Connor, J., concurring) (suggesting metrics other than formal academic achievement that may play a role in parents' educational choices in a failed school district). The choice offered under the program may have therefore helped ensure that the program achieved its secular aims by delegating funding decisions to a class of persons – parents – who were better positioned than a state policymaking body to make educational choices for individual students in a failing school system.

Drawing upon these two circumstances – the role the person making the choice occupies in the structure of a program and whether delegating the choice promotes the secular purpose of the program – we turn to defendants' argument that the individual, *taxpayer* choice provided under Section 1089 necessarily has the same constitutional effect as the parental choice upheld in *Zelman*. Under Section 1089, individual taxpayers may constrain the scholarship options of other parents' children by choosing to direct their state-reimbursed contributions to sectarian STOs. Yet unlike parents, whose choices directly

affect their children, taxpayers have no structural incentives under Section 1089 to direct their contributions primarily for secular reasons, such as the academic caliber of the schools to which a STO restricts aid, rather than for sectarian reasons, such as the religious mission of a particular STO. Thus, the taxpayers' position in the structure of Section 1089 provides no "'effective means of guaranteeing'" that taxpayers will refrain from using the program for sectarian purposes. *Larkin*, 459 U.S. at 125 (quoting *Nyquist*, 413 U.S. at 780). Significantly, plaintiffs' allegations suggest the taxpayers' role in the structure of Section 1089, as applied, *encourages* them to use the tax credits to promote sectarian goals, and that taxpayers have in fact used the program aid to this end.

Relatedly, the taxpayer choice provided under Section 1089 does little to advance – indeed, it appears to thwart – the secular purpose of the program, which is to provide equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents.[17] Defendants do not suggest taxpayers are better positioned than government

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[17] Even if we assumed that taxpayer choice does, in some respect, advance the secular objectives of Section 1089, plaintiffs may be able to demonstrate that "these valid secular objectives can be readily accomplished by other means," and therefore that the program nevertheless "could be seen as having a 'primary' and 'principal' effect of advancing religion." *Larkin*, 459 U.S. at 123-24, 126.

administrators to allocate program aid in a manner that will expand schooling options, and plaintiffs' allegations suggest the demand for STO-provided scholarships available for use at secular schools markedly outstrips their supply. This misalignment between parents' interests and taxpayers' desires suggests that by vesting individual taxpayers with funding authority, Section 1089's design works against its purpose of providing Arizona students with *equal* access to a wide range of schooling options. Although Section 1089 leaves individual parents free to create new STOs that cater to their educational preferences, this freedom provides little benefit to parents who do not have the time or capital to get others to support their STO, given that these parents cannot use their tax credits to fund scholarships for their own children.

Accordingly, we conclude that there is a meaningful constitutional distinction between the individual, taxpayer choice provided under Section 1089 and the parental choice upheld in *Zelman*.[18] Section 1089, as

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[18] In *Green v. Garriott*, 212 P.3d 96, 2009 Ariz. App. LEXIS 33, 2009 WL 623346 (Ariz. Ct. App. March 12, 2009), the Arizona Court of Appeals in a 2-1 decision rejected an Establishment Clause challenge to Ariz. Rev. Stat. § 43-1183, which gives dollar-for-dollar tax credits to corporations for contributions to STOs. The *Green* majority did not consider, as we do here, whether any lack of religious neutrality in the actual operation of Section 1183 "carries with it the *imprimatur* of government endorsement," *Zelman*, 536 U.S. at 655, and we are unpersuaded by the analysis of whether § 1183 is a program of "true private choice" for the reasons we have already discussed at length.

claimed to operate in practice, is not a program of true private choice, immune from further constitutional scrutiny. We therefore hold that plaintiffs have alleged facts upon which a reasonable, informed observer could conclude that Section 1089, as applied, violates the Establishment Clause even though the state does not directly decide whether any particular sectarian organizations will receive program aid.

The district court's order dismissing plaintiffs' complaint is reversed and remanded for further proceedings consistent with this opinion.

**REVERSED and REMANDED for further proceedings.**

**Kathleen M. Winn,**
**an Arizona taxpayer, et al., Plaintiffs,**
**vs.**
**J. Elliot Hibbs, in his official capacity as Director of the Arizona Department of Revenue, et al., Defendants.**

**No. CIV 00-0287-PHX-EHC**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

***361 F. Supp. 2d 1117; 2005 U.S. Dist. LEXIS 5100***

**March 24, 2005, Decided**
**March 25, 2005, Filed**

**COUNSEL:** For KATHLEEN M WINN, an Arizona taxpayer, DIANE WOLFTHAL, Arizona taxpayer, MAURICE WOLFTHAL, Arizona taxpayer, LYNN HOFFMAN, an Arizona taxpayer, plaintiffs: Marvin S Cohen, Esq, Sacks Tierney PA, Scottsdale, AZ; Isabel Mary Humphrey, Hunter Humphrey & Yavitz PLC, Phoenix, AZ.

For LISA GRAHAM KEEGAN, Superintendent of Public Instruction, intervenor: Patrick Gerard Byrne, Esq, Snell & Wilmer LLP, Phoenix, AZ; William H Mellor, Richard D Komer, Matthew B Berry, Institute for Justice, Washington, DC; Clint Daniel Bolick, Institute for Justice, Phoenix, AZ.

For ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, intervenor-defendant: Gary Stuart McCaleb, Alliance Defense Fund Legal Ctr, Scottsdale, AZ.

For J ELLIOT HIBBS, defendant: Mary Ruth O'Grady, Paula S Bickett, Esq, Office of the Attorney General, Phoenix, AZ.

For ARIZONA SCHOOL CHOICE TRUST, GLENN DENNARD, LUIS MOSCOSO, defendants: Clint Daniel Bolick, Timothy David Keller, Institute for Justice, Phoenix, AZ.

For ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, intervenor: Benjamin W Bull, Esq, Joshua William Carden, Alliance Defense Fund Legal Ctr, Scottsdale, AZ.

**JUDGES:** Earl H. Carroll, United States District Judge.

**OPINION BY:** Earl H. Carroll

**OPINION**

**ORDER**

Intervenor-Defendant Arizona Christian School Tuition Organization (ACSTO) filed a Motion to Intervene [Dk. 64], which is unopposed. Defendants Arizona School Choice Trust, Glenn Dennard, and Luis Moscoso (collectively "ASCT") filed a Motion to Dismiss [Dk. 71]. Defendant Hibbs filed a Motion for Judgment on the Pleadings [Dk. 72]. ACSTO filed a Motion to Dismiss [Dk. 73]. Plaintiffs responded to the Motions to Dismiss and Motion for Judgment on

the Pleadings.[1] ASCT replied.[2] Defendant Hibbs replied [Dk. 77].

**Procedural History**

This case was filed on February 15, 2000. The Court dismissed for lack of subject matter jurisdiction based on the Tax Injunction Act and principles of comity on February 27, 2001 [Dk. 36]. The Ninth Circuit reversed on both of these grounds and remanded. *Winn v. Killian*, 307 F.3d 1011 (9th Cir. Oct. 3, 2002), *reh'g denied*, 321 F.3d 911 (9th Cir. 2003). The Supreme Court granted certiorari, *Hibbs v. Winn*, 539 U.S. 986, 156 L. Ed. 2d 703, 124 S. Ct. 45 (2003), and affirmed, holding that the Tax Injunction Act did not bar Plaintiff's suit. 542 U.S. 88, 159 L. Ed. 2d 172, 124 S.Ct. 2276 (2004).

**Plaintiffs' Complaint**

Plaintiffs challenge the constitutionality of A.R.S. § 43-1089[3] ("Tuition Tax Credit") under the First and

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[1] Plaintiffs lodged the Response to these Motions on October 29, 2004, which was not docketed pending the Court's ruling (*infra*) on Plaintiffs' Motion for Leave to Exceed Page Limits [Dk. 74].

[2] The reply is file-stamped November 15, 2004, but was placed undocketed on the left side of the file.

[3] The statute was enacted in 1997. Minor amendments which are immaterial to this case have since been made [Dk. 72 at 2]. The Court cites the current version of the statute in this Order.

Fourteenth Amendments. The Tuition Tax Credit allows Arizona income taxpayers who voluntarily contribute money to a "student tuition organization" (STO) to receive a dollar-for-dollar tax credit up to $500 of their annual tax liability.[4] A.R.S. § 43-1089(A)(1). Thus, Arizona taxpayers who know about the Tuition Tax Credit can effectively choose whether $500 of their tax liability goes to the State or to an STO. A.R.S. § 43-1089(A). No limit is placed on the number of taxpayers who use the Tuition Tax Credit. *Id.* In addition, the Tax Credit is available to all taxpayers, regardless of whether they have children in school or have incurred any educational expenses. *Id.* Taxpayers may earmark their donations for specific children who are not their dependants. A.R.S. § 43-1089(D).

An STO is a charitable organization exempt from federal taxation under I.R.C. § 501(c)(3). A.R.S. § 43-1089(F)(3). Each STO uses taxpayers' voluntary cash contributions to provide scholarships and tuition grants to students attending the "qualified schools" with which the STO is affiliated. A "qualified school" is, essentially, a private school, defined in the statute as a "nongovernmental primary or secondary school or a preschool for handicapped students that is located in this state, that does not discriminate on the basis of race, color, handicap, familial status or national

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[4] The tax credit is $625 for married taxpayers filing jointly. A.R.S. § 43-1089(A)(2).

origin" and that satisfies Arizona's requirements for private schools. A.R.S. § 43-1089(F)(2).

An STO must use at least 90% of the donations received from taxpayers for scholarships or tuition grants to children "to allow them to attend any qualified school of their parents' choice." A.R.S. § 43-1089(F)(3). While this restriction could be read to require each STO to give scholarships to students for use at any private school in the state, the STOs in practice have designated their own list of private schools at which the scholarship money must be used. However, an STO may not award scholarships to students who are all at the same school. *Id.*[5]

Plaintiffs allege that the largest STOs are religious organizations that restrict their donations to private religious schools which in turn use these funds to promote religious education and worship. In 1998, at least $1.7 million out of $1.8 million (94%) of taxpayer donations to STOs went to STOs that restricted scholarships to students attending religious schools. For example, the three largest STOs, which included ACSTO, received 85% of total STO donations in 1998. Each of these STOs restricted the disbursement of scholarship funds to private religious schools. In 2003, according to the Arizona Department of

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[5] For example, a private school could not set up an affiliated STO serving only that school so that contributing parents could effectively lower each other's tuition by $500. However, two or more schools are permitted to form an STO to achieve this same end.

Revenue, there were 51 STOs. Forty-seven of these STOs which reported their donations received a total of $29.1 million [Dk. 71, Att. 2]. Plaintiffs estimate that at least $22.6 million (78% of the total donations) went to STOs which offered scholarships that could only be used at religious schools [Plaintiffs' Response]; that at least $22.2 million of the total donations (91%) went to students attending religious schools; and that, through 2003, STOs have received $113.3 million that otherwise would have gone to the State. *Id.*

Plaintiffs argue that because most STOs are religious organizations that restrict grants to religious schools, parents who wish to send their children to a non-religious private school may be unable to find an STO that is willing to make a tuition grant to a non-religious private school. Plaintiffs allege that the Tuition Tax Credit as applied allows state revenues to fund education in a religiously preferential manner in violation of the Constitution. Plaintiffs seek preliminary and permanent injunctive relief, a declaratory judgment that § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments, and that STOs which make tuition grants for schools of only one religious denomination must return grants to the State of Arizona general fund.

**The Motions to Dismiss and Motion for Judgment on the Pleadings**

ASCT raises three arguments in the Motion to Dismiss: first, that Plaintiffs lack taxpayer standing under the Establishment Clause; second, that Plaintiffs fail to state a claim upon which relief can be granted in light of the Supreme Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639, 153 L. Ed. 2d 604, 122 S. Ct. 2460 (2002); and third, that Plaintiff's claims were decided by the Arizona Supreme Court in *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (1999), and are therefore barred by the doctrine of res judicata [Dk. 71]. Defendant Hibbs, in his Motion for Judgment on the Pleadings, discusses *Zelman* and res judicata [Dk. 72]. ACSTO, in its Motion to Dismiss, discusses standing, res judicata, and the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971) [Dk. 73]. If the Court assumes that Plaintiffs have standing and that the case is not barred by res judicata, Plaintiffs have failed to state a claim under the Establishment Clause.

**Failure to State an Establishment Clause Claim under *Zelman***

Defendants argue that Plaintiffs fail to state a claim upon which relief can be granted in light of the Supreme Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639, 153 L. Ed. 2d 604, 122 S. Ct. 2460 (2002). In *Zelman*, the Supreme Court considered Ohio's Pilot Project Scholarship Program ("Cleveland program"), which provided financial

assistance to any Ohio School District which was "under a federal court order requiring supervision and operational management of the district by the state superintendent." 536 U.S. at 644, 122 S. Ct. at 2463. The Cleveland City School District was Ohio's only school district in this category. 536 U.S. at 645, 122 S. Ct. at 2463.

The Cleveland program provided tuition aid for students to attend a participating public or private school of their parents' choosing. Students remaining in public schools were eligible for tutorial aid. *Id.* Participating private schools were not permitted to discriminate on the basis of religion. *Id.* Tuition aid was distributed according to financial need. 536 U.S. at 646, 122 S. Ct. at 2464. Over 3,700 students received tuition aid from the Cleveland program, and 96% of these students enrolled in religiously affiliated schools. 536 U.S. at 647, 122 S. Ct. at 2464. Sixty percent of these students came from families at or below the poverty line. *Id.*

The Supreme Court held that the Establishment Clause "prevents a State from enacting laws that have the purpose or effect of advancing or inhibiting religion." 536 U.S. at 648-49, 122 S.Ct. at 2465 (citation and internal quotation marks omitted). Although the government may not provide aid directly to religious schools, "programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals," do not

violate the Establishment Clause. 536 U.S. at 649, 122 S.Ct. at 2465.

1. Secular Purpose of the Tuition Tax Credit

A "plausible secular purpose" for the Tuition Tax Credit "may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. 388, 395, 77 L. Ed. 2d 721, 103 S. Ct. 3062, 3067 (1983). The Tuition Tax Credit on its face does not mention religion but is instead part of a secular state policy to maximize parents' choices as to where they send their children to school. *Kotterman*, 193 Ariz. at 278, 279 P.2d at 616. Public school districts in Arizona may not charge tuition and must provide for open enrollment. A.R.S. § 15-816.01(A); *Kotterman*, 193 Ariz. at 283, 972 P.2d at 616. Arizona has established charter schools in order to "provide additional academic choices for parents and pupils." A.R.S. § 15-181 (1994). Charter schools are public schools that do not charge tuition.[6] Arizona provides another tax credit, approved on the same day as the Tuition Tax Credit, that only benefits public schools. A.R.S. § 43-1089.01. As amended, this tax credit allows any Arizona taxpayer to receive up to a $200 tax credit[7] for fees

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[6] Arizona has 348 charter schools in operation. Arizona State Board for Charter Schools, Charter Summary Report, http://www.asbcs.state.az.us/asbcs/CharterSummary.asp (last visited March 23, 2005).

[7] Married tax payers filing jointly can claim a $250 tax credit. A.R.S. § 43-1089.01(A)(2).

paid or cash contributions made to public schools for extracurricular activities or character education. *Id.* Finally, Arizona has a permissive home-schooling policy. A.R.S. § 15-802 (authorizing education at home-school); A.R.S. § 15-803 (excepting home-schooled students from mandatory public school attendance); A.R.S. § 15-745 (excepting home-schooled students from testing while they are receiving home school instruction).

2. Programs of True Private Choice

The Tuition Tax Credit is a program of "true private choice." *Zelman*, 536 U.S. at 649, 122 S. Ct. at 2465. The benefits of the Tuition Tax Credit are available to a broad spectrum of groups; money which would otherwise go to the State can only go to religious schools after being filtered through multiple layers of private choice; and recipients of STO funds still have financial incentives to attend public schools. Indeed, Arizona has given its schoolchildren a range of educational choices consistent with a program of true private choice. Therefore, the fact that most donations to STOs have ultimately gone to religious schools does not implicate the Establishment Clause.

First, whether the Tuition Tax Credit is made available to a broad spectrum of groups is "an important index of secular effect." *Zelman*, 536 U.S. at 650, 122 S. Ct. at 2466 (citing *Widmar v. Vincent*, 454 U.S. 263, 274, 70 L. Ed. 2d 440, 102 S. Ct. 269, 277 (1981)). Any student in the state, without regard

to religion, may apply for and potentially receive an STO scholarship to attend a private school, secular or religious. In fact, the Tuition Tax Credit is available to an even broader spectrum of the public than the Cleveland program in the sense that all Arizona taxpayers, not just parents of students, can use the tax credit to exercise a choice in how their money, which would otherwise be subject to taxes, is spent.

Second, the Tuition Tax Credit provides for multiple layers of private choice such that "government aid [reaches] religious institutions only by way of the deliberate choices of numerous individual recipients." *Zelman*, 536 U.S. at 652, 122 S.Ct. at 2467. In this way, "government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." 536 U.S. at 652-53, 122 S.Ct. at 2467. The Tuition Tax Credit allows for the private formation of non-profit STOs to raise money for the schools of their choice. Then, taxpayers, if they elect to invoke the tax credit at all, donate to the STO of their choice. Finally, parents choose the school that they want their child to attend and apply for aid from an STO which grants scholarships to that school. Whereas the Cleveland program disbursed government funds to private schools,[8] the Tuition Tax Credit allows funds which the government would otherwise receive to go to the STOs for disbursement, insulating

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[8] The Ohio statute provided for checks to be made directly to parents who then endorsed the checks over to the chosen school. 536 U.S. at 646, 122 S.Ct. at 2464.

the funds with an additional layer of private choice not present in *Zelman*, 536 U.S. at 646, 122 S.Ct. at 2464.

Third, the Tuition Tax Credit does not provide taxpayers or students financial incentives which are skewed toward religious schools. *Zelman*, 536 U.S. at 653, 122 S.Ct. at 2468. STOs have no financial incentive to fund religious schools over secular ones. Taxpayers have no financial incentive to support STOs which favor religious schools over STOs that do not; indeed, taxpayers have no financial incentive to support any STO at all to the degree that they may not make donations to their own dependants. Nor do parents of students have any skewed financial incentive to send their child to a religious school. An Arizona student may attend any public school in the state without cost, just as the students in *Zelman* could attend community and magnet schools for free. 536 U.S. at 654, 122 S.Ct. at 2468. In contrast, the average scholarship paid by STOs in 2003 for students to attend private schools was $1,222,[9] a sum unlikely to cover all of the costs of private school attendance [Response, Att. 2 at 2].

In *Zelman*, the Court inquired whether the state was coercing parents into sending their children to religious schools by "evaluating *all* options Ohio provides Cleveland schoolchildren." 536 U.S. at 655-56, 122 S.Ct. at 2469 (emphasis in original). Arizona

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[9] The average scholarship award in 1998 was $452.

has provided the requisite "range of educational choices," 536 U.S. at 655, 122 S.Ct. at 2469, to parents through its policy of free public education (including open enrollment and the provision of charter schools), tax credit for donations to public school extracurricular activities and character education, and permissive home-schooling policy. The Tuition Tax Credit expands parents' private school options, both secular and religious.

Where the challenged program was neutral toward religion and preserved true private choice, the *Zelman* court did not attach constitutional significance to the amount of state funds ultimately spent on religious education or the number of scholarship recipients enrolled in religious schools. 536 U.S. at 658, 122 S.Ct. at 2470. In Arizona, many (perhaps most) STOs have chosen to support, sometimes exclusively, religious schools; most taxpayers have chosen to support STOs which favor religious schools; most private schools have chosen to incorporate religion into their educational mission; and most STO scholarship recipients have chosen to attend religious schools. These private choices, and there are literally thousands of them, do not implicate the Establishment Clause. *See* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion . . . ").

Plaintiffs argue that the fact that STOs may elect to disburse scholarship funds based in part on religious affiliation distinguishes this case from *Zelman*. They point out that ASCT, one of the largest

STOs that does not disburse its scholarships with any reference to religion, had a waiting list of over 700 people in the Fall of 2004 [Dk. 71, Exh. 3]. In *Zelman*, the Court found it significant that the benefits of the Cleveland program were "available to all families on neutral terms, without reference to religion." 536 U.S. at 653, 122 S. Ct. at 2468. Here, the fact that most STOs fund only religious schools represents a multitude of private choices not implicating the Establishment clause. The Tax Tuition Credit is neutral on its face and as applied; nothing prevents taxpayers from increasing their contributions to existing STOs which provide scholarships to secular private schools or from forming new STOs themselves for that same purpose. *See* 536 U.S. at 658, 122 S.Ct. at 2470 ("The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.").[10]

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[10] The ACST [sic] School Quarterly that Plaintiffs cite reported that "[O]ver 700 students are on ASCT's waiting list for scholarships. But that can change! Thanks to the **limitless potential of the scholarship tax credit program**, we have **the opportunity to receive millions in new tax credit donations annually**, enough to fund thousands of additional scholarships. Past experience suggests that a dollar spent on marketing the tax credit program will return more than ten dollars in scholarship tax credit donations" (emphasis in original) [Dk. 71, Exh. 3].

Plaintiffs also argue that the Cleveland program is distinguishable from the Tuition Tax Credit because the former provided vouchers for both public and private schools, whereas the latter only provides assistance to private schools. This distinction is not relevant here. First, the State has a policy, of which the Tuition Tax Credit is only a small part, to maximize parents' educational choices for their children, primarily in the public schools.[11] Second, states may provide assistance to private schools without violating the Establishment Clause. In *Mueller v. Allen,* the Supreme Court held that a Minnesota tax deduction for parents' expenses in providing tuition, textbooks and transportation for their children attending elementary or secondary schools, public or private, did not violate the *Establishment Clause*. 463 U.S. 388, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983). The *Mueller* court held that a state may "conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian." 463 U.S. at 395, 103 S.Ct. at 3067.

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[11] For example, the State appropriated $2.6 billion to the Department of Education in FY 2002-2003, or 43.5% of the total budget. Arizona Department of Education, Annual Financial Report, State Funding for Education, http://www.ade.state.az.us/annualreport/annualreport2003/Summary/StateFundEducation.htm (last visited on March 23, 2005).

Third, the Supreme Court's ruling in *Committee For Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973), is distinguishable from this case. The *Nyquist* court held that a New York program conferring a package of benefits exclusively on private schools and parents of private school enrollees violated the Establishment Clause. However, the *Zelman* court held that "*Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion." 536 U.S. at 662, 122 S.Ct. at 2472. The Tuition Tax Credit is a neutral, secular program whose benefits are available to all Arizona taxpayers and students. Furthermore, multiple layers of private choice ensure that the State itself does not aid recipients with regard to their religion.

Finally, Plaintiffs argue that the educational crisis precipitating the Cleveland program distinguishes this case from *Zelman*. Indeed, the Supreme Court recognized that the purpose of the Cleveland program was to "assist poor children in failed schools." 536 U.S. at 655, 122 S.Ct. at 2469. In contrast, Defendants have not argued that Arizona schools are failing or even that the Tuition Tax Credit will primarily benefit the poor. However, Plaintiffs' objections are irrelevant to the constitutional analysis, which only asks whether the program has a valid secular purpose, seeking neither to advance nor inhibit religion. 536 U.S. at 648-649, 122 S.Ct. at

2465; *cf. Am. Jewish Cong. v. Corp. for Nat'l. & Cmty. Serv.*, 399 F.3d 351 (D.C. Cir. 2005) (holding that discretionary distribution of government funds to AmeriCorps recipients is permissible under the Establishment Clause, which only requires that government distribute funds neutrally with respect to religion), *rev'g* 323 F.Supp.2d 44 (D. D.C. 2004). Arizona's policy of maximizing the choices available to parents is a valid secular purpose; indeed, no useful purpose would be served by making the State wait until its schools were in the same kind of trouble as Cleveland's before implementing a program of true private choice.

**Conclusion**

The Court, having accepted all allegations in the Complaint as true, finds that Plaintiffs have failed to state a claim under the Establishment Clause.

Accordingly,

**IT IS ORDERED GRANTING** Intervenor-Defendant Arizona Christian School Tuition Organization's Motion to Intervene [Dk. 64].

**IT IS FURTHER ORDERED GRANTING** ASCT's Motion to Dismiss [Dk. 71] without prejudice.

**IT IS FURTHER ORDERED DENYING AS MOOT** Defendant Hibbs' Motion for Judgment on the Pleadings [Dk. 72].

**IT IS FURTHER ORDERED DENYING AS MOOT** ACSTO's Motion to Dismiss [Dk. 73].

DATED this 24 day of March, 2005.

Earl H. Carroll
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHLEEN M WINN, an Arizona taxpayer; DIANE WOLFTHAL, an Arizona taxpayer; MAURICE WOLFTHAL, an Arizona taxpayer; LYNN HOFFMAN, an Arizona taxpayer,

Plaintiffs-Appellants,

v.

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION; ARIZONA SCHOOL CHOICE TRUST; LUIS MOSCOSO; GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue; GLENN DENNARD,

Defendants-Appellees.

No. 05-15754

D.C. No. CV-00-00287-EHC
District of Arizona, Phoenix

ORDER

(Filed Nov. 16, 2009)

Before: D.W. NELSON, REINHARDT and FISHER, Circuit Judges.

The motion to stay the mandate, filed October 29, 2009 by appellees Arizona School Choice Trust, et al., and Arizona Christian School Tuition Organization, is granted.

**UNITED STATES DISTRICT COURT**

**DISTRICT OF ARIZONA**

| | |
|---|---|
| Kathleen M. Winn, et al., Plaintiff, vs. J. Elliott Hibbs, et al., Defendants. | **JUDGMENT IN A CIVIL CASE** CV 00-0287 PHX EHC (Filed Mar. 25, 2005) |

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court has granted the Defendants Motion to Dismiss, therefore the Plaintiff shall take nothing. This complaint and action are hereby dismissed.

March 25, 2005
Date

RICHARD H. WEARE
District Court
Executive/Clerk

/s/ [Illegible]
(By) Deputy Clerk

cc: (all counsel)

**J. ELLIOTT HIBBS, DIRECTOR, ARIZONA DEPARTMENT OF REVENUE, Petitioner, v. KATHLEEN M. WINN et al.**

**No. 02-1809**

**SUPREME COURT OF THE UNITED STATES**

***542 U.S. 88; 124 S. Ct. 2276; 159 L. Ed. 2d 172; 2004 U.S. LEXIS 4175; 72 U.S.L.W. 4482; 17 Fla. L. Weekly Fed. S 382***

**January 20, 2004, Argued**
**June 14, 2004, Decided**

**COUNSEL:** Samuel Goddard argued the cause for petitioner.

Thomas G. Hungar argued the cause for the United States, as amicus curiae, by special leave of court.

Marvin S. Cohen argued the cause for respondents.

**JUDGES:** Ginsburg, J., delivered the opinion of the Court, in which Stevens, O'Connor, Souter, and Breyer, JJ., joined. Stevens, J., filed a concurring opinion, *post,* p. 112. Kennedy, J., filed a dissenting opinion, in which Rehnquist, C. J., and Scalia and Thomas, JJ., joined, *post,* p. 113.

**OPINION BY:** GINSBURG

**OPINION**

Justice Ginsburg delivered the opinion of the Court.

Arizona law authorizes income-tax credits for payments to organizations that award educational

scholarships and tuition grants to children attending private schools. *See* Ariz. Rev. Stat. Ann. § 43-1089 (West Supp. 2003). Plaintiffs below, respondents here, brought an action in federal court challenging § 43-1089, and seeking to enjoin its operation, on Establishment Clause grounds. The question presented is whether the Tax Injunction Act (TIA or Act), 28 U.S.C. § 1341, which prohibits a lower federal court from restraining "the assessment, levy or collection of any tax under State law," bars the suit. Plaintiffs-respondents do not contest their own tax liability. Nor do they seek to impede Arizona's receipt of tax revenues. Their suit, we hold, is not the kind § 1341 proscribes.

In decisions spanning a near half century, courts in the federal system, including this Court, have entertained challenges to tax credits authorized by state law, without conceiving of § 1341 as a jurisdictional barrier. On this first occasion squarely to confront the issue, we confirm the authority federal courts exercised in those cases.

It is hardly ancient history that States, once bent on maintaining racial segregation in public schools, and allocating resources disproportionately to benefit white students to the detriment of black students, fastened on tuition grants and tax credits as a promising means to circumvent *Brown v. Board of Education*, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954). The federal courts, this Court among them, adjudicated the ensuing challenges, instituted under 42 U.S.C. § 1983, and upheld the Constitution's equal

protection requirement. *See, e.g., Griffin v. School Board,* 377 U.S. 218, 233, 12 L. Ed. 2d 256, 84 S. Ct. 1226 (1964) (faced with unconstitutional closure of county public schools and tuition grants and tax credits for contributions to private segregated schools, District Court could require county to levy taxes to fund nondiscriminatory public schools), rev'g 322 F.2d 332, 343-344 (CA4 1963) (abstention required until state courts determine validity of grants, tax credits, and public-school closing), aff'g *Allen v. County School Bd. of Prince Edward Cty.,* 198 F. Supp. 497, 503 (ED Va. 1961) (county enjoined from paying grants or providing tax credits to support private schools that exclude students based on race while public schools remain closed), and aff'g 207 F. Supp. 349, 355 (ED Va. 1962) (closure of public schools enjoined). *See also Moton v. Lambert,* 508 F. Supp. 367, 368 (ND Miss. 1981) (challenge to tax exemptions for racially discriminatory private schools may proceed in federal court).

In the instant case, petitioner Hibbs, Director of Arizona's Department of Revenue, argues, in effect, that we and other federal courts were wrong in those civil-rights cases. The TIA, petitioner maintains, trumps § 1983; the Act, according to petitioner, bars all lower federal-court interference with state tax systems, even when the challengers are not endeavoring to avoid a tax imposed on them, and no matter whether the State's revenues would be raised or lowered should the plaintiffs prevail. The alleged jurisdictional bar, which petitioner asserts has

existed since the TIA's enactment in 1937, was not even imagined by the jurists in the pathmarking civil-rights cases just cited, or by the defendants in those cases, litigants with every interest in defeating federal-court adjudicatory authority. Our prior decisions command no respect, petitioner urges, because they constitute mere "sub silentio holdings." Reply Brief for Petitioner 8. We reject that assessment.

We examine in this opinion both the scope of the term "assessment" as used in the TIA, and the question whether the Act was intended to insulate state tax laws from constitutional challenge in lower federal courts even when the suit would have no negative impact on tax collection. Concluding that this suit implicates neither § 1341's conception of assessment nor any of the statute's underlying purposes, we affirm the judgment of the Court of Appeals.

I

Plaintiffs-respondents, Arizona taxpayers, filed suit in the United States District Court for the District of Arizona, challenging Ariz. Rev. Stat. Ann. § 43-1089 (West Supp. 2003) as incompatible with the Establishment Clause. Section 43-1089 provides a credit to taxpayers who contribute money to "school tuition organizations" (STOs). An STO is a nonprofit organization that directs moneys, in the form of scholarship grants, to students enrolled in private elementary or secondary schools. STOs must disburse

as scholarship grants at least 90 percent of contributions received, may allow donors to direct scholarships to individual students, may not allow donors to name their own dependents, must designate at least two schools whose students will receive funds, and must not designate schools that "discriminate on the basis of race, color, handicap, familial status or national origin." *See* §§ 43-1089(D)-(F). STOs are not precluded by Arizona's statute from designating schools that provide religious instruction or that give admissions preference on the basis of religion or religious affiliation. When taxpayers donate money to a qualified STO, § 43-1089 allows them, in calculating their Arizona tax liability, to credit up to $500 of their donation (or $625 for a married couple filing jointly, § 43-1089(A)(2)).

In effect, § 43-1089 gives Arizona taxpayers an election. They may direct $500 (or, for joint-return filers, $625) to an STO, or to the Arizona Department of Revenue. As long as donors do not give STOs more than their total tax liability, their $500 or $625 contributions are costless.

The Arizona Supreme Court, by a 3-to-2 vote, rejected a facial challenge to § 43-1089 before the statute went into effect. *Kotterman v. Killian,* 193 Ariz. 273, 972 P.2d 606 (1999) (en banc). That case took the form of a special discretionary action invoking the court's original jurisdiction. *See id.,* at 277, 972 P. 2d, at 610. *Kotterman,* it is undisputed, has no preclusive effect on the instant as-applied challenge to § 43-1089 brought by different plaintiffs.

Respondents' federal-court complaint against the Director of Arizona's Department of Revenue (Director) alleged that § 43-1089 "authorizes the formation of agencies that have as their sole purpose the distribution of State funds to children of a particular religious denomination or to children attending schools of a particular religious denomination." Complaint ¶ 13, App. 10. Respondents sought injunctive and declaratory relief, and an order requiring STOs to pay funds still in their possession "into the state general fund." *Id.*, at 7-8, App. 15.

The Director moved to dismiss the action, relying on the TIA, which reads in its entirety:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

The Director did not assert that a federal-court order enjoining § 43-1089 would interfere with the State's tax levy or collection efforts. He urged only that a federal injunction would restrain the "assessment" of taxes "under State law." Agreeing with the Director, the District Court held that the TIA required dismissal of the suit. App. to Pet. for Cert. 31.

The Court of Appeals for the Ninth Circuit reversed, holding that "a federal action challenging the granting of a state tax credit is not prohibited by the [TIA]." *Winn v. Killian*, 307 F.3d 1011, 1017

(2002). Far from "adversely affect[ing] the state's ability to raise revenue," the Court of Appeals observed, "the relief requested by [respondents] . . . would result in the state's receiving more funds that could be used for the public benefit." *Id.*, at 1017, 1018. We granted certiorari, 539 U.S. 986, 156 L. Ed. 2d 703, 124 S. Ct. 45 (2003), in view of the division of opinion on whether the TIA bars constitutional challenges to state tax credits in federal court. Compare 307 F.3d, at 1017, with *ACLU Foundation v. Bridges,* 334 F.3d 416, 421-423 (CA5 2003) (TIA bars federal action seeking to have any part of a State's tax system declared unconstitutional). We now affirm the judgment of the Ninth Circuit.

II

Before reaching the merits of this case, we must address respondents' contention that the Director's petition for certiorari was jurisdictionally untimely under 28 U.S.C. § 2101(c) and our Rules. *See* Brief in Opposition 8-13. Section 2101(c) instructs that a petition for certiorari must be filed "within ninety days after the entry of . . . judgment." This Court's Rule 13.3 elaborates:

> "The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, the time to file the

> petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment."

Respondents assert that the Director's petition missed the Rule's deadlines: More than 90 days elapsed between the date the Court of Appeals first entered judgment and the date the petition was filed, rendering the filing untimely under the first sentence of the Rule; and because no party petitioned for rehearing, the extended periods prescribed by the Rule's second sentence never came into play.

This case, however, did not follow the typical course. The Court of Appeals, on its own motion, recalled its mandate and ordered the parties to brief the question whether the case should be reheard en banc. That order, we conclude, suspended the judgment's finality under § 2101(c), just as a timely filed rehearing petition would, or a court's appropriate decision to consider a late-filed rehearing petition. Compare *Young v. Harper,* 520 U.S. 143, 147, n. 1, 137 L. Ed. 2d 270, 117 S. Ct. 1148 (1997) (appeals court agreed to consider a late-filed rehearing petition; timeliness of petition for certiorari measured from date court disposed of rehearing petition), with *Missouri v. Jenkins,* 495 U.S. 33, 49, 109 L. Ed. 2d 31, 110 S. Ct. 1651 (1990) ("The time for applying for certiorari will not be tolled when it appears that the lower court granted rehearing or

amended its order solely for the purpose of extending that time.").

A timely rehearing petition, a court's appropriate decision to entertain an untimely rehearing petition, and a court's direction, on its own initiative, that the parties address whether rehearing should be ordered share this key characteristic: All three raise the question whether the court will modify the judgment and alter the parties' rights. *See id.*, at 46, 109 L. Ed. 2d 31, 110 S. Ct. 1651 ("A timely petition for rehearing . . . operates to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties" (quoting *Department of Banking of Neb. v. Pink*, 317 U.S. 264, 266, 87 L. Ed. 254, 63 S. Ct. 233 (1942) *(per curiam)*; alterations in original)). In other words, "while [a] petition for rehearing is pending," or while the court is considering, on its own initiative, whether rehearing should be ordered, "there is no 'judgment' to be reviewed." *Jenkins*, 495 U.S., at 46, 109 L. Ed. 2d 31, 110 S. Ct. 1651.

In this light, we hold that the Director's petition for a writ of certiorari was timely. When the Court of Appeals ordered briefing on the rehearing issue, 90 days had not yet passed from the issuance of the panel opinion. Because § 2101(c)'s 90-day limit had not yet expired, the clock could still be reset by an order that left unresolved whether the court would modify its judgment. The court-initiated briefing order had just that effect. Because a genuinely final

judgment is critical under the statute, we must treat the date of the court's order denying rehearing en banc as the date judgment was entered. The petition was filed within 90 days of that date and was thus timely under the statute.

Were we to read Rule 13 as our sole guide, so that only a rehearing petition filed by a party could reset the statute's 90-day count, we would lose sight of the congressional objective underpinning § 2101(c): An appellate court's final adjudication, Congress indicated, marks the time from which the period allowed for a certiorari petition begins to run. The statute takes priority over the "procedural rules adopted by the Court for the orderly transaction of its business." *Schacht v. United States*, 398 U.S. 58, 64, 26 L. Ed. 2d 44, 90 S. Ct. 1555 (1970). When court-created rules fail to anticipate unusual circumstances that fit securely within a federal statute's compass, the statute controls our decision. *See, e.g., Kontrick v. Ryan*, 540 U.S. 443, 453, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004) ("'[I]t is axiomatic' that [court-prescribed procedural rules] 'do not create or withdraw federal jurisdiction.'" (quoting *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370, 57 L. Ed. 2d 274, 98 S. Ct. 2396 (1978))). Because the petition for a writ of certiorari was timely under § 2101(c), we have jurisdiction to decide whether the TIA bars respondents' suit.

III

To determine whether this litigation falls within the TIA's prohibition, it is appropriate, first, to identify the relief sought. Respondents seek prospective relief only. Specifically, their complaint requests "injunctive relief prohibiting [the Director] from allowing taxpayers to utilize the tax credit authorized by A. R. S. § 43-1089 for payments made to STOs that make tuition grants to children attending religious schools, to children attending schools of only one religious denomination, or to children selected on the basis of their religion." Complaint 7, App. 15. Respondents further ask for a "declaration that A. R. S. § 43-1089, on its face and as applied," violates the Establishment Clause "by affirmatively authorizing STOs to use State income-tax revenues to pay tuition for students attending religious schools or schools that discriminate on the basis of religion." *Ibid.* Finally, respondents seek "[a]n order that [the Director] inform all [such] STOs that . . . all funds in their possession as of the date of this Court's order must be paid into the state general fund." Complaint 7-8, App. 15. Taking account of the prospective nature of the relief requested, does respondents' suit, in 28 U.S.C. § 1341's words, seek to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law"? The answer to that question turns

on the meaning of the term "assessment" as employed in the TIA.[1]

As used in the Internal Revenue Code (IRC), the term "assessment" involves a "recording" of the amount the taxpayer owes the Government. 26 U.S.C. § 6203. The "assessment" is "essentially a bookkeeping notation." *Laing v. United States*, 423 U.S. 161, 170, n. 13, 46 L. Ed. 2d 416, 96 S. Ct. 473 (1976). Section 6201(a) of the IRC authorizes the Secretary of the Treasury "to make . . . assessments of all taxes . . . imposed by this title." An assessment is made "by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary." § 6203.[2] *See also* M. Saltzman, IRS Practice and Procedure ¶ 10.02, pp 10-4 to 10-7 (2d ed. 1991) (when Internal Revenue

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[1] State taxation, for § 1341 purposes, includes local taxation. *See* 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4237, pp 643-644 (2d ed. 1988) ("Local taxes are imposed under authority of state law and the courts have held that the Tax Injunction Act applies to them."); R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1173 (5th ed. 2003) ("For purposes of the Act, local taxes have uniformly been held to be collected 'under State law.' ").

[2] Section 301.6203-1 of the Treasury Regulations states that an assessment is accomplished by the "assessment officer signing the summary record of assessment," which, "through supporting records," provides "identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment." 26 CFR § 301.6203-1 (2003).

Service (IRS) signs "summary list" of assessment to record amount of tax liability, "the official act of assessment has occurred for purposes of the Code").[3]

We do not focus on the word "assessment" in isolation, however. Instead, we follow "the cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 596, 157 L. Ed. 2d 1094, 124 S. Ct. 1236 (2004) (internal quotation marks omitted). In § 1341

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[3] The term "assessment" is used in a variety of ways in tax law. In the property-tax setting, the word usually refers to the process by which the taxing authority assigns a taxable value to real or personal property. *See, e.g.*, F. Schoettle, State and Local Taxation: The Law and Policy of Multi-Jurisdictional Taxation 799 (2003) ("ASSESSMENT – The process of putting a value on real or personal property for purposes of a tax to be measured as a percentage of property values. The valuation is ordinarily done by a government official, the 'assessor' or 'tax assessor,' who will sometimes hire a private professional to do the actual valuations."); Black's Law Dictionary 112 (7th ed. 1999) (defining "assessment" as, *inter alia:* "Official valuation of property for purposes of taxation. – Also termed *tax assessment.* Cf. appraisal."). *See also* 5 R. Powell, Real Property § 39.02 (M. Wolf ed. 2000). To calculate the amount of property taxes owed, the tax assessor multiplies the assessed value by the appropriate tax rate. *See, e.g.*, R. Werner, Real Estate Law 534 (11th ed. 2002). Income taxes, by contrast, are typically self assessed in the United States. As anyone who has filed a tax return is unlikely to forget, the taxpayer, not the taxing authority, is the first party to make the relevant calculation of income taxes owed. The word "self-assessment," however, is not a technical term; as IRC § 6201(a) indicates, the IRS executes the formal act of income-tax assessment.

and tax law generally, an assessment is closely tied to the collection of a tax, *i.e.*, the assessment is the official recording of liability that triggers levy and collection efforts.

The rule against superfluities complements the principle that courts are to interpret the words of a statute in context. *See* 2A N. Singer, Statutes and Statutory Construction § 46.06, pp 181-186 (rev. 6th ed. 2000) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . ." (footnotes omitted)). If, as the Director asserts, the term "assessment," by itself, signified "[t]he entire plan or scheme fixed upon for charging or taxing," Brief for Petitioner 12 (quoting Webster's New International Dictionary of the English Language 166 (2d ed. 1934)), the TIA would not need the words "levy" or "collection"; the term "assessment," alone, would do all the necessary work.

Earlier this Term, in *United States v. Galletti*, 541 U.S. 114, 124 S. Ct. 1548, 158 L. Ed. 2d 279 (2004), the Government identified "two important consequences" that follow from the IRS' timely tax assessment: "[T]he IRS may employ administrative enforcement methods such as tax liens and levies to collect the outstanding tax," *see* 26 U.S.C. §§ 6321-6327, 6331-6344; and "the time within which the IRS may collect the tax either administratively *or* by a 'proceeding in court' is extended [from 3 years] to 10 years after the date of assessment," *see* §§ 6501(a), 6502(a). Brief for United States in *United States v.*

*Galletti*, O. T. 2003, No. 02-1389, pp 15-16. The Government thus made clear in briefing *Galletti* that, under the IRC definition, the tax "assessment" serves as the t[illegible]gger for levy and collection efforts. The Governm[illegible]t did not describe the term as synonymous with the entire plan of taxation. Nor did it disassociate the word "assessment" from the company ("levy or collection") that word keeps.[4] Instead, and in accord with our understanding, the Government related "assessment" to the term's collection-propelling function.

IV

Congress modeled § 1341 upon earlier federal "statutes of similar import," laws that, in turn, paralleled state provisions proscribing "actions in State courts to enjoin the collection of State and county taxes." S. Rep. No. 1035, 75th Cong., 1st Sess., 1 (1937) (hereinafter S. Rep.). In composing the TIA's text, Congress drew particularly on an 1867 measure, sometimes called the Anti-Injunction Act (AIA), which bars "any court" from entertaining a suit brought "for the purpose of restraining the assessment or

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[4] The dissent is of two minds in this regard. On the one hand, it twice suggests that a proper definition of the term "assessment," for § 1341 purposes, is "the entire plan or scheme fixed upon for charging or taxing." *Post*, at 117, 159 L. Ed. 2d, at 195-196. On the other hand, the dissent would disconnect the word from the enforcement process ("levy or collection") that "assessment" sets in motion. *See post*, at 117-119, 159 L. Ed. 2d, at 196.

collection of any [federal] tax." Act of Mar. 2, 1867, ch 169, § 10, 14 Stat. 475, now codified at 26 U.S.C. § 7421(a). *See Jefferson County v. Acker,* 527 U.S. 423, 434-435, 144 L. Ed. 2d 408, 119 S. Ct. 2069 (1999). While § 7421(a) "apparently has no recorded legislative history," *Bob Jones Univ. v. Simon,* 416 U.S. 725, 736, 40 L. Ed. 2d 496, 94 S. Ct. 2038 (1974), the Court has recognized, from the AIA's text, that the measure serves twin purposes: It responds to "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference"; and it "'require[s] that the legal right to the disputed sums be determined in a suit for refund,'" *ibid.* (quoting *Enochs v. Williams Packing & Nav. Co.,* 370 U.S. 1, 7, 8 L. Ed. 2d 292, 82 S. Ct. 1125 (1962)).[5] Lower federal courts have similarly comprehended § 7421(a). *See, e.g., McGlotten v. Connally,* 338 F. Supp. 448, 453-454 (DC 1972) (three-judge court) (§ 7421(a) does not bar action seeking to enjoin income-tax exemptions to fraternal orders that exclude nonwhites from membership, for in such an action, plaintiff "does not contest the amount of his own tax, nor does he seek to limit the amount of tax revenue collectible by the United States" (footnote omitted)); *Tax Analysts and Advocates v. Shultz,* 376 F. Supp. 889, 892 (DC 1974)

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[5] That Congress had in mind challenges to assessments triggering collections, *i.e.,* attempts to prevent the collection of revenue, is borne out by the final clause of 26 U.S.C. § 7421(a), added in 1966: "whether or not such person is the person *against whom* such tax was assessed." (Emphasis added.)

(Section 7421(a) does not bar challenge to IRS revenue ruling allowing contributors to political candidate committees to avoid federal gift tax on contributions in excess of $3,000 ceiling; while § 7421(a) "precludes suits to restrain the assessment or collection of taxes," the proscription does not apply when "plaintiffs seek not to restrain the Commissioner from collecting taxes, but rather to *require* him to collect *additional* taxes according to the mandates of the law." (emphases in original)).[6]

Just as the AIA shields federal tax collections from federal-court injunctions, so the TIA shields state tax collections from federal-court restraints. In both 26 U.S.C. § 7421(a) and 28 U.S.C. § 1341, Congress directed taxpayers to pursue refund suits instead of attempting to restrain collections. Third-party suits not seeking to stop the collection (or contest the validity) of a tax *imposed on plaintiffs*, as

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[6] The dissent incorrectly ranks *South Carolina v. Regan*, 465 U.S. 367, 79 L. Ed. 2d 372, 104 S. Ct. 1107 (1984), with *McGlotten* and *Tax Analysts and Advocates. Post*, at 120-121, 159 L. Ed. 2d, at 197-198. *See also post*, at 122, 159 L. Ed. 2d, at 199. The latter decisions, as the text notes, did not seek to stop the collection of taxes. In contrast, in *South Carolina* v *Regan*, the State's suit aimed to reduce federal revenue receipts: South Carolina sought to enjoin as a violation of its Tenth Amendment rights not "a federal tax exemption," *post*, at 120, 159 L. Ed. 2d, at 198, but federal income taxation of the interest on certain state-issued bonds. The Court held in that unique suit that § 7421(a) did not bar this Court's exercise of original jurisdiction over the case. 465 U.S., at 381, 79 L. Ed. 2d 372, 104 S. Ct. 1107.

*McGlotten,* 338 F. Supp. ___, at 453-454, and *Tax Analysts,* 376 F. Supp. ___, at 892, explained, were outside Congress' purview. The TIA's legislative history is not silent in this regard. The Act was designed expressly to restrict "the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes." S. Rep., p. 1.

Specifically, the Senate Report commented that the Act had two closely related, state-revenue-protective objectives: (1) to eliminate disparities between taxpayers who could seek injunctive relief in federal court – usually out-of-state corporations asserting diversity jurisdiction – and taxpayers with recourse only to state courts, which generally required taxpayers to pay first and litigate later; and (2) to stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances. *Id.,* at 1-2; *see* R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1173 (5th ed. 2003) (citing *Rosewell v. LaSalle Nat. Bank,* 450 U.S. 503, 522-523, 67 L. Ed. 2d 464, 101 S. Ct. 1221 (1981)). *See also Jefferson County,* 527 U.S., at 435, 144 L. Ed. 2d 408, 119 S. Ct. 2069 (observing that the TIA was "shaped by state and federal provisions barring anticipatory actions by taxpayers to stop the tax collector from initiating collection proceedings"). In short, in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the

taxing authority. Nowhere does the legislative history announce a sweeping congressional direction to prevent "federal-court interference with all aspects of state tax administration." Brief for Petitioner 20; *post,* at 123, 159 L. Ed. 2d, at 199.[7]

The understanding of the Act's purposes and legislative history set out above underpins this Court's previous applications of the TIA. In *California v. Grace Brethren Church,* 457 U.S. 393, 73 L. Ed. 2d 93, 102 S. Ct. 2498 (1982), for example, we recognized that the principal purpose of the TIA was to "limit drastically" federal-court interference with "the collection of [state] taxes." *Id,* at 408-409, 73 L. Ed. 2d 93, 102 S. Ct. 2498 (quoting *Rosewell,* 450 U.S., at 522, 67 L. Ed. 2d 464, 101 S. Ct. 1221). True, the Court referred to the disruption of "state tax administration," but it did so specifically in relation to "the collection of revenue." 457 U.S., at 410, 73 L. Ed. 2d 93, 102 S. Ct. 2498 (quoting *Perez v. Ledesma,* 401 U.S. 82, 128, n. 17, 27 L. Ed. 2d 701, 91 S. Ct. 674 (1971) (Brennan, J., concurring in part and

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[7] The language of the TIA differs significantly from that of the Johnson Act, which provides in part: "The district courts shall not enjoin, suspend or restrain *the operation of, or compliance with,*" public-utility rate orders made by state regulatory bodies. 28 U.S.C. § 1342 (emphasis added). The TIA does not prohibit interference with "the operation of, or compliance with," state tax laws; rather, § 1341 proscribes interference only with those aspects of state tax regimes that are needed to produce revenue – *i.e.,* assessment, levy, and collection.

dissenting in part)). The complainants in *Grace Brethren Church* were several California churches and religious schools. They sought federal-court relief from an unemployment compensation tax that state law imposed on them. 457 U.S., at 398, 73 L. Ed. 2d 93, 102 S. Ct. 2498. Their federal action, which bypassed state remedies, was exactly what the TIA was designed to ward off. The Director and the dissent endeavor to reconstruct *Grace Brethren Church* as precedent for the proposition that the TIA totally immunizes from lower federal-court review "all aspects of state tax administration, and not just interference with the collection of revenue." Brief for Petitioner 20; *see post,* at 123-124, 159 L. Ed. 2d, at 199-200. The endeavor is unavailing given the issue before the Court in *Grace Brethren Church* and the context in which the words "state tax administration" appear.

The Director invokes several other decisions alleged to keep matters of "state tax administration" entirely free from lower federal-court "interference." Brief for Petitioner 17-21; accord *post,* at 124-125, 159 L. Ed. 2d, at 200-201. Like *Grace Brethren Church,* all of them fall within § 1341's undisputed compass: All involved plaintiffs who mounted federal litigation to avoid paying state taxes (or to gain a refund of such taxes). Federal-court relief, therefore, would have operated to reduce the flow of state tax revenue. *See Arkansas v. Farm Credit Servs. of Central Ark.,* 520 U.S. 821, 824, 138 L. Ed. 2d 34, 117 S. Ct. 1776 (1997) (corporations chartered under federal law

claimed exemption from Arkansas sales and income taxation); *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 584, 132 L. Ed. 2d 509, 115 S. Ct. 2351 (1995) (action seeking to prevent Oklahoma from collecting taxes State imposed on nonresident motor carriers); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 105-106, 70 L. Ed. 2d 271, 102 S. Ct. 177 (1981) (taxpayers, alleging unequal taxation of real property, sought, *inter alia*, damages measured by alleged tax overassessments); *Rosewell*, 450 U.S., at 510, 67 L. Ed. 2d 464, 101 S. Ct. 1221 (state taxpayer, alleging her property was inequitably assessed, refused to pay state taxes).[8]

Our prior decisions are not fairly portrayed cut loose from their secure, state-revenue-protective moorings. *See, e.g., Grace Brethren Church*, 457 U.S., at 410, 73 L. Ed. 2d 93, 102 S. Ct. 2498 ("If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and *taxpayers might escape the*

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[8] Petitioner urges, and the dissent agrees, that the TIA safeguards another vital state interest: the authority of state courts to determine what state law means. Brief for Petitioner 21; *post*, at 125, 159 L. Ed. 2d, at 200-201. Respondents, however, have not asked the District Court to interpret any state law – there is no disagreement as to the meaning of Ariz. Rev. Stat. Ann. § 43-1089 (West Supp. 2003), only about whether, as applied, the State's law violates the Federal Constitution. *See supra*, at 94-95, 159 L. Ed. 2d, at 181-182. That is a question federal courts are no doubt equipped to adjudicate.

*ordinary procedural requirements imposed by state law.* During the pendency of the federal suit *the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency.*" (quoting *Ledesma*, 401 U.S., at 128, n. 17, 27 L. Ed. 2d 701, 91 S. Ct. 674 (Brennan, J., concurring in part and dissenting in part; emphases added)); *Rosewell*, 450 U.S., at 527-528, 67 L. Ed. 2d 464, 101 S. Ct. 1221 ("The compelling nature of these considerations [identified by Justice Brennan in *Perez*] is underscored by the dependency of state budgets on the receipt of local tax revenues. . . . We may readily appreciate the difficulties encountered by the county should a substantial portion of its rightful tax revenue be tied up in injunction actions.").[9]

In sum, this Court has interpreted and applied the TIA only in cases Congress wrote the Act to address, *i.e.*, cases in which state taxpayers seek federal-court orders enabling them to avoid paying

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[9] We note, furthermore, that this Court has relied upon "principles of comity," Brief for Petitioner 26, to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection. *See Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 107-108, 70 L Ed 2d 271, 102 S Ct 177 (1981) (Missouri taxpayers sought damages for increased taxes caused by alleged overassessments); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 296-299, 87 L. Ed. 1407, 63 S. Ct. 1070 (1943) (plaintiffs challenged Louisiana's unemployment compensation tax).

state taxes. *See supra,* at 105-106, 159 L. Ed. 2d, at 200-201. We have read harmoniously the § 1341 instruction conditioning the jurisdictional bar on the availability of "a plain, speedy and efficient remedy" in state court. The remedy inspected in our decisions was not one designed for the universe of plaintiffs who sue the State. Rather, it was a remedy tailor-made for taxpayers. *See, e.g., Rosewell,* 450 U.S., at 528, 67 L. Ed. 2d 464, 101 S. Ct. 1221 ("Illinois' legal remedy that provides property owners paying property taxes under protest a refund without interest in two years is a 'plain, speedy and efficient remedy' under the [TIA]"); *Grace Brethren Church,* 457 U.S., at 411, 73 L. Ed. 2d 93, 102 S. Ct. 2498 ("[A] state-court remedy is 'plain, speedy and efficient' only if it 'provides the taxpayer with a "full hearing and judicial determination" at which she may raise any and all constitutional objections to the tax.'" (quoting *Rosewell,* 450 U.S., at 514, 67 L. Ed. 2d 464, 101 S. Ct. 1221)).[10]

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[10] Far from "ignor[ing]" the "plain, speedy and efficient remedy" proviso, as the dissent charges, *post,* at 121, 159 L. Ed. 2d, at 198, we agree that this "codified exception" is key to a proper understanding of the Act. The statute requires the State to provide *taxpayers* with a swift and certain remedy when they resist tax collections. An action dependent on a court's discretion, for example, would not qualify as a fitting taxpayer's remedy. Cf. *supra,* at 96, 159 L. Ed. 2d, at 182.

V

In other federal courts as well, § 1341 has been read to restrain state taxpayers from instituting federal actions to contest their liability for state taxes, but not to stop third parties from pursuing constitutional challenges to tax benefits in a federal forum. Relevant to the distinction between taxpayer claims that would reduce state revenues and third-party claims that would enlarge state receipts, Seventh Circuit Judge Easterbrook wrote trenchantly:

> "Although the district court concluded that § 1341 applies to any federal litigation touching on the subject of state taxes, neither the language nor the legislative history of the statute supports this interpretation. The text of § 1341 does not suggest that federal courts should tread lightly in issuing orders that might allow local governments to raise additional taxes. The legislative history . . . shows that § 1341 is designed to ensure that federal courts do not interfere with states' collection of taxes, so long as the taxpayers have an opportunity to present to a court federal defenses to the imposition and collection of the taxes. The legislative history is filled with concern that federal judgments were emptying state coffers and that corporations with access to the diversity jurisdiction could obtain remedies unavailable to resident taxpayers. *There was no articulated concern about federal courts' flogging state and local governments*

> *to collect additional taxes.*" *Dunn v. Carey*, 808 F.2d 555, 558 (1986) (emphasis added).

Second Circuit Judge Friendly earlier expressed a similar view of § 1341:

> "The [TIA's] context and the legislative history . . . lead us to conclude that, in speaking of 'collection,' Congress was referring to methods similar to assessment and levy, *e.g.*, distress or execution . . . that would produce money or other property directly, rather than indirectly through a more general use of coercive power. Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of the particular taxes *imposed upon them*. . . ." *Wells v. Malloy*, 510 F.2d 74, 77 (CA2 1975) (emphasis added).

*See also In re Jackson County*, 834 F.2d 150, 151-152 (CA8 1987) (observing that "§ 1341 has been held to be inapplicable to efforts to require collection of additional taxes, as opposed to efforts to inhibit the collection of taxes").[11]

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[11] In conflict with sister Circuits, and at odds with its own prior opinions, the Fifth Circuit, in *ACLU Foundation v. Bridges*, 334 F.3d 416 (2003), recently construed the TIA in the way the Director does here. *Bridges* involved a challenge to tax exemptions for religious activities in several Louisiana statutes. The District Court, in line with earlier Fifth Circuit decisions, held that the TIA did not apply because the plaintiff was not seeking to restrain the "assessment, levy or collection" of state

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taxes, but to eliminate allegedly unconstitutional tax exemptions. Reversing, the Fifth Circuit ruled that the TIA bars any federal suit seeking to have any portion of a State's tax system declared unconstitutional. *Id.*, at 421-423.

The Director and the United States refer to four other federal-court decisions lending some support for their view that, for § 1341 purposes, no line should be drawn between challenges that would reduce revenues and attacks that might augment collections. *See* Reply Brief for Petitioner 8-9 (citing *Kraebel v. New York City Dept. of Housing Preservation & Dev.*, 959 F.2d 395 (CA2 1992); *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237 (CA11 1991); *In re Gillis*, 836 F.2d 1001 (CA6 1988); *United States Brewers Assn. v. Perez*, 592 F.2d 1212 (CA1 1979)). *See also* Brief for United States as *Amicus Curiae* 14-15. In two of the cases, taxpayers were seeking relief aimed at lightening their own tax burdens. *Kraebel* held that § 1341 barred a taxpayer's constitutional challenge to a property-tax exemption and abatement scheme. 959 F.2d, at 400. *Colonial Pipeline* held that a taxpayer's suit seeking a court-ordered redistribution of Georgia's ad valorem tax system, which might have reduced plaintiff's tax bill, implicated § 1341's jurisdictional bar. 921 F.2d, at 1243. The court did observe, broadly: "[The] requested relief, if granted, . . . would clearly conflict with the principle underlying the [TIA] that the federal courts should generally avoid interfering with the sensitive and peculiarly local concerns surrounding state taxation schemes." *Id.*, at 1242.

*Gillis*, unlike *Kraebel* and *Colonial Pipeline*, was a third-party action. The court declined to decide "[w]hether the [TIA] actually does bar the availability of such relief," but noted that a suit seeking to enhance state revenues may nonetheless fall within § 1341's bar because "the Act is not, by its own language, limited to the *collection* of taxes." 836 F.2d, at 1005 (emphasis in original). Finally, *Perez* concerned the Butler Act, 48 U.S.C. § 872, a TIA analog applicable to Puerto Rico. Ordering dismissal of the case for want of jurisdiction, the court rested its decision not on statutory construction, but on "underl[ying]" comity concerns, stating: "[A]n order of a federal court requiring Commonwealth officials to collect taxes which its legislature has

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Further, numerous federal-court decisions – including decisions of this Court reviewing lower federal-court judgments – have reached the merits of third-party constitutional challenges to tax benefits without mentioning the TIA. *See, e.g., Byrne v. Public Funds for Public Schools of New Jersey*, 442 U.S. 907, 61 L. Ed. 2d 273, 99 S. Ct. 2818 (1979), summarily aff'g 590 F.2d 514 (CA3 1979) (state tax deduction for taxpayers with children attending nonpublic schools violates Establishment Clause), aff'g 444 F. Supp. 1228 (NJ 1978); *Franchise Tax Board of California v. United Americans for Public Schools*, 419 U.S. 890, 42 L. Ed. 2d 135, 95 S. Ct. 166 (1974) (summarily affirming district-court judgment striking down state statute that provided income-tax reductions for taxpayers sending children to nonpublic schools); *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973) (state tax benefits for parents of children attending nonpublic schools violates Establishment Clause), rev'g in relevant part 350 F. Supp. 655 (SDNY 1972) (three-judge court); *Grit v. Wolman*, 413 U.S. 901, 37 L. Ed. 2d 1021, 93 S. Ct. 3062 (1973), summarily aff'g *Kosydar v. Wolman*, 353 F. Supp. 744, 755-756 (SD Ohio 1972) (three-judge court) (state tax credits for expenses relating to children's enrollment in nonpublic schools violate Establishment Clause); *Finlator*

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not seen fit to impose on its citizens strikes us as a particularly inappropriate involvement in a state's management of its fiscal operations." 592 F.2d at 1214-1215

*v. Powers*, 902 F.2d 1158 (CA4 1990) (state statute exempting Christian Bibles, but not holy books of other religions or other books, from state tax violates Establishment Clause); *Luthens v. Bair*, 788 F. Supp. 1032 (SD Iowa 1992) (state law authorizing tax benefit for tuition payments and textbook purchases does not violate Establishment Clause); *Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp. 1316 (Minn. 1978) (three-judge court) (state law allowing parents of public or private school students to claim part of tuition and transportation expenses as tax deduction does not violate Establishment Clause).[12]

In a procession of cases not rationally distinguishable from this one, no Justice or member of the bar of this Court ever raised a § 1341 objection that, according to the petitioner in this case, should have caused us to order dismissal of the action for want of jurisdiction. *See Mueller v. Allen*, 463 U.S. 388, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983) (state tax

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[12] In school desegregation cases, as a last resort, federal courts have asserted authority to direct the imposition of, or increase in, local tax levies, even in amounts exceeding the ceiling set by state law. *See Missouri v. Jenkins*, 495 U.S. 33, 57, 109 L. Ed. 2d 31, 110 S. Ct. 1651 (1990); *Liddell v. Missouri*, 731 F.2d 1294, 1320 (CA8 1984) (en banc); cf. *Griffin v. County School Board*, 377 U.S. 218, 233, 12 L. Ed. 2d 256, 84 S. Ct. 1226 (1964). Controversial as such a measure may be, *see Jenkins*, 495 U.S., at 65-81, 109 L. Ed. 2d 31, 110 S. Ct. 1651 (Kennedy, J., concurring in part and concurring in judgment), it is noteworthy that § 1341 was not raised in those cases by counsel, lower courts, or this Court on its own motion.

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deduction for parents who send their children to parochial schools does not violate Establishment Clause); *Byrne*, 442 U.S. 907, 61 L. Ed. 2d 273, 99 S. Ct. 2818; *United Americans for Public Schools*, 419 U.S. 890, 42 L. Ed. 2d 135, 95 S. Ct. 166; *Committee for Public Ed. & Religious Liberty*, 413 U.S. 756, 37 L. Ed. 2d 948, 93 S. Ct. 2955; *Wolman*, 413 U.S. 901, 37 L. Ed. 2d 1021, 93 S. Ct. 3062; *Griffin*, 377 U.S. 218, 12 L. Ed. 2d 256, 84 S. Ct. 1226. Consistent with the decades-long understanding prevailing on this issue, respondents' suit may proceed without any TIA impediment.[13]

For the reasons stated, the judgment of the United States Court of Appeals for the Ninth Circuit is affirmed.

**CONCUR BY:** STEVENS,

**CONCUR**

Justice Stevens, concurring.

In Part IV of his dissent, Justice KENNEDY observes that "years of unexamined habit by litigants and the courts" do not lessen this Court's obligation

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[13] In confirming that cases of this order may be brought in federal court, we do not suggest that "state courts are second rate constitutional arbiters." *Post*, at 113, 159 L. Ed. 2d, at 193. Instead, we underscore that adjudications of great moment discerning no § 1341 barrier, *see supra*, at 93-94, 159 L. Ed. 2d, at 180-181, cannot be written off as reflecting nothing more than "unexamined custom," *post*, at 114, 159 L. Ed. 2d, at 194, or unthinking "habit," *post*, at 126, 159 L. Ed. 2d, at 202.

correctly to interpret a statute. *Post,* at 126, 159 L. Ed. 2d, at 202. It merits emphasis, however, that prolonged congressional silence in response to a settled interpretation of a federal statute provides powerful support for maintaining the status quo. In statutory matters, judicial restraint strongly counsels waiting for Congress to take the initiative in modifying rules on which judges and litigants have relied. *See BedRoc Limited, LLC v. United States,* 541 U.S. 176, 192, 124 S. Ct. 1587, 158 L. Ed. 2d 338 (2004) (Stevens, J., dissenting); *Federal Election Comm'n v. NRA Political Victory Fund,* 513 U.S. 88, 100-105, 130 L. Ed. 2d 439, 115 S. Ct. 537 (1994) (Stevens, J., dissenting); *Commissioner v. Fink,* 483 U.S. 89, 101-103, 97 L. Ed. 2d 74, 107 S. Ct. 2729 (1987) (Stevens, J., dissenting); *Runyon v. McCrary,* 427 U.S. 160, 189-192, 49 L. Ed. 2d 415, 96 S. Ct. 2586 (1976) (Stevens, J., concurring). In a contest between the dictionary and the doctrine of *stare decisis,* the latter clearly wins. The Court's fine opinion, which I join without reservation, is consistent with these views.

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**DISSENT BY:** KENNEDY

**DISSENT**

Justice Kennedy, with whom the Chief Justice, Justice Scalia, and Justice Thomas join, dissenting.

In this case, the Court shows great skepticism for the state courts' ability to vindicate constitutional

wrongs. Two points make clear that the Court treats States as diminished and disfavored powers, rather than merely applies statutory text. First, the Court's analysis of the Tax Injunction Act (TIA or Act), 28 USC § 1341, contrasts with a literal reading of its terms. Second, the Court's assertion that legislative histories support the conclusion that "[t]hird-party suits not seeking to stop the collection (or contest the validity) of a tax *imposed on plaintiffs* . . . were outside Congress' purview" in enacting the TIA and the anti-injunction provision on which the TIA was modeled, *ante,* at 104, 159 L. Ed. 2d, at 187, is not borne out by those sources, as previously recognized by the Court. In light of these points, today's holding should probably be attributed to the concern the Court candidly shows animates it. *See ante,* at 93, 159 L. Ed. 2d, at 180-181 (noting it was the federal courts that "upheld the Constitution's equal protection requirement" when States circumvented *Brown v. Board of Education,* 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954), by manipulating their tax laws). The concern, it seems, is that state courts are second rate constitutional arbiters, unequal to their federal counterparts. State courts are due more respect than this. Dismissive treatment of state courts is particularly unjustified since the TIA, by express terms, provides a federal safeguard: The Act lifts its bar on federal-court intervention when state courts fail to provide "a plain, speedy, and efficient remedy." § 1341.

In view of the TIA's text, the congressional judgment that state courts are qualified constitutional arbiters, and the respect state courts deserve, I disagree with the majority's superseding the balance the Act strikes between federal- and state-court adjudication. I agree with the majority that the petition for certiorari was timely under 28 U.S.C. § 2101(c), *see ante,* at 96-99, 159 L. Ed. 2d, at 183-184, and so submit this respectful dissent on the merits of the decision.

I

Today is the first time the Court has considered whether the TIA bars federal district courts from granting injunctive relief that would prevent States from giving citizens statutorily mandated state tax credits. There are cases, some dating back almost 50 years, which proceeded as if the jurisdictional bar did not apply to tax credit challenges; but some more recent decisions have said the bar is applicable. Compare, *e.g., Mueller v. Allen,* 463 U.S. 388, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983); *Committee for Public Ed. & Religious Liberty v. Nyquist,* 413 U.S. 756, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973); *Griffin v. County School Board,* 377 U.S. 218, 12 L. Ed. 2d 256, 84 S. Ct. 1226 (1964), with, *e.g., ACLU Foundation of La. v. Bridges,* 334 F.3d 416 (CA5 2003); *In re Gillis,* 836 F.2d 1001 (CA6 1988). While unexamined custom favors the first position, the statutory text favors the latter. In these circumstances a careful explanation for the conclusion is necessary; but in the end the

scope and purpose of the Act should be understood from its terms alone.

The question presented – whether the TIA bars the District Court from granting injunctive relief against the tax credit – requires two inquiries. First, the term assessment, as used in § 1341, must be defined. Second, we must determine if an injunction prohibiting the Director of Arizona's Department of Revenue (Director) from allowing the credit would enjoin, suspend, or restrain an assessment.

The word assessment in the TIA is not isolated from its use in another federal statute. The TIA was modeled on the anti-injunction provision of the Internal Revenue Code (Code), 26 U.S.C. § 7421(a). *See Jefferson County v. Acker*, 527 U.S. 423, 434, 144 L. Ed. 2d 408, 119 S. Ct. 2069 (1999). That provision specifies, and has specified since 1867, that federal courts may not restrain or enjoin an "assessment or collection of any [federal] tax." 26 U.S.C. § 7421(a) (first codified by Act of Mar. 2, 1867, ch 169, § 10, 14 Stat. 475). The meaning of the term assessment in this Code provision is discernible by reference to other Code sections. 26 U.S.C. § 1 *et seq.*

Chapter 63 of Title 26 addresses the subject of assessments and sheds light on the meaning of the term in the Code. Section 6201 first instructs that "[t]he Secretary [of the Internal Revenue Service] is . . . required to make the . . . assessments of all taxes . . . imposed by this title. . . ." 26 U.S.C. § 6201(a). Further it provides, "[t]he Secretary shall assess

all taxes determined by the taxpayer or by the Secretary. . . ." § 6201(a)(1). Section 6203 in turn sets forth a method for making an assessment: "The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary."

Taken together, the provisions of Title 26 establish that an assessment, as that term is used in § 7421(a), must at the least encompass the recording of a taxpayer's ultimate tax liability. This is what the taxpayer owes the Government. *See also Laing v. United States,* 423 U.S. 161, 170, n. 13, 46 L. Ed. 2d 416, 96 S. Ct. 473 (1976) ("The 'assessment,' essentially a bookkeeping notation, is made when the Secretary or his delegate establishes an account against the taxpayer on the tax rolls"). Whether the Secretary or his delegate (today, the Commissioner) makes the recording on the basis of a taxpayer's self-reported filing form or instead chooses to rely on his own calculation of the taxpayer's liability (*e.g.,* via an audit) is irrelevant. The recording of the liability on the Government's tax rolls is itself an assessment.

The TIA was modeled on the anti-injunction provision, *see Jefferson County, supra;* it incorporates the same terminology employed by the provision; and it employs that terminology for the same purpose. It is sensible, then, to interpret the TIA's terms by reference to the Code's use of the term. Cf. *Lorillard v. Pons,* 434 U.S. 575, 581, 55 L. Ed. 2d 40, 98 S. Ct. 866 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of

the interpretation given to the incorporated law, at least insofar as it affects the new statute"). The Court of Appeals, which concluded that an assessment was the official estimate of the value of income or property used to calculate a tax or the imposition of a tax on someone, *Winn v. Killian,* 307 F.3d 1011, 1015 (CA9 2002), placed principal reliance for its interpretation on a dictionary definition. That was not entirely misplaced; but unless the definition is considered in the context of the prior statute, the advantage of that statute's interpretive guidance is lost.

Furthermore, the court defined the term in an unusual way. It relied on a dictionary that was unavailable when the TIA was enacted; it relied not on the definition of the term under consideration, "assessment," but on the definition of the term's related verb form, "assess"; and it examined only a portion of that term's definition. In the dictionary used by the Court of Appeals, the verb is defined in two ways not noted by the court. One of the alternative definitions is quite relevant – "(2) to fix or determine the amount of (damages, a tax, a fine, etc.)." Compare *ibid.* with Random House Dictionary of the English Language 90 (1979). Further:

> "Had [the panel] looked in a different lay dictionary, [it] would have found a definition contrary to the one it preferred, such as 'the entire plan or scheme fixed upon for charging or taxing.' . . . Had the panel considered tax treatises and law dictionaries . . . it would have found much in accord with this broader

> definition. . . . Even the federal income tax code supports a broad reading of 'assessment.'" *Winn v. Killian*, 321 F.3d 911, 912 (CA9 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc) (footnote omitted).

Guided first by the Internal Revenue Code, an assessment under § 1341, at a minimum, is the recording of taxpayers' liability on the State's tax rolls. The TIA, though a federal statute that must be interpreted as a matter of federal law, operates in a state-law context. In this respect, the Act must be interpreted so as to apply evenly to the 50 various state-law regimes and to the various recording schemes States employ. It is therefore irrelevant whether state officials record taxpayer liabilities with their own pen in a specified location, by collecting and maintaining taxpayers' self-reported filing forms, or in some other manner. The recordkeeping that equates to the determination of taxpayer liability on the State's tax rolls is the assessment, whatever the method. The Court seems to agree with this. *See ante*, at 99-102, 159 L. Ed. 2d at 184-186.

The dictionary definition of assessment provides further relevant information. Contemporaneous dictionaries from the time of the TIA's enactment define assessment in expansive terms. They would broaden any understanding of the term, and so the Act's bar. *See, e.g.*, Webster's New International Dictionary 139 (1927) (providing three context relevant definitions for the term assessment: It is the act of apportioning

or determining an amount to be paid; a valuation of property for the purpose of taxation; or the entire plan or scheme fixed upon for charging or taxing). *See also United States v. Galletti*, 541 U.S. 114, 122, 124 S. Ct. 1548, 158 L. Ed. 2d 279 (2004) (noting that under the Code the term assessment refers not only to recordings of tax liability but also to "the calculation . . . of a tax liability," including self-calculation done by the taxpayer). The Court need not decide the full scope of the term assessment in the TIA, however. For present purposes, a narrow definition of the term suffices. Applying the narrowest definition, the TIA's literal text bars district courts from enjoining, suspending, or restraining a State's recording of taxpayer liability on its tax rolls, whether the recordings are made by self-reported taxpayer filing forms or by a State's calculation of taxpayer liability.

The terms "enjoin, suspend, or restrain" require little scrutiny. No doubt, they have discrete purposes in the context of the TIA; but they also have a common meaning. They refer to actions that restrict assessments to varying degrees. It is noteworthy that the term "enjoin" has not just its meaning in the restrictive sense but also has meaning in an affirmative sense. The Black's Law Dictionary current at the TIA's enactment gives as a definition of the term, "to require; command; positively direct." Black's Law Dictionary 663 (3d ed. 1933). That definition may well be implicated here, since an order invalidating a tax credit would seem to command

States to collect taxes they otherwise would not collect. The parties, however, proceed on the assumption that enjoin means to bar. It is unobjectionable for the Court to make the assumption too, leaving the broader definition for later consideration.

Respondents argue the TIA does not bar the injunction they seek because even after the credit is enjoined, the Director will be able to record and enforce taxpayers' liabilities. *See* Brief for Respondents 16. In fact, respondents say, with the credit out of the way the Director will be able to record and enforce a higher level of liability and so profit the State. *Ibid.* ("The amount of tax payable by some taxpayers would increase, but that can hardly be characterized as an injunction or restraint of the assessment process"). The argument, however, ignores an important part of the Act: "under State law." 28 U.S.C. § 1341 ("The district courts shall not enjoin, suspend or restrain the assessment . . . of any tax under State law"). The Act not only bars district courts from enjoining, suspending, or restraining a State's recording of taxpayer liabilities altogether; but it also bars them from enjoining, suspending, or restraining a State from recording the taxpayer liability that state law mandates.

Section 43-1089 is state law. It is an integral part of the State's tax statute; it is reflected on state tax forms; and the State Supreme Court has held that it is part of the calculus necessary to determine tax liability. *See Kotterman v. Killian*, 193 Ariz. 273, 279, 285, 972 P.2d 606, 612, 618 (1999). A recording of a

taxpayer's liability under state law must be made in accordance with § 43-1089. The same can be said with respect to each and every provision of the State's tax law. To order the Director not to record on the State's tax rolls taxpayer liability that reflects the operation of § 43-1089 (or any other state tax law provision for that matter) would be to bar the Director from recording the correct taxpayer liability. The TIA's language bars this relief and so bars this suit.

The Court tries to avoid this conclusion by saying that the recordings that constitute assessments under § 1341 must have a "collection-propelling function," *ante*, at 102, 159 L. Ed. 2d, at 186, and that the recordings at issue here do not have such a function. *See also ante*, at 102, n. 4, 159 L. Ed. 2d, at 186 ("[T]he dissent would disconnect the word [assessment] from the enforcement process"). That is wrong. A recording of taxpayer liability on the State's tax rolls of course propels collection. In most cases the taxpayer's payment will accompany his filing, and thus will accompany the assessment so that no literal collection of moneys is necessary. As anyone who has paid taxes must know, however, if owed payment were not included with the tax filing, the State's recording of one's liability on the State's rolls would certainly cause subsequent collection efforts, for the filing's recording (*i.e.*, the assessment) would propel collection by establishing the State's legal right to the taxpayer's moneys.

II

The majority offers prior judicial interpretations of the Code's similarly worded anti-injunction provision to support its contrary conclusions about the statutory text. *See ante*, at 102-103, 159 L. Ed. 2d, at 186-187. That this Court and other federal courts have allowed nontaxpayer suits challenging tax credits to proceed in the face of the anti-injunction provision is not at all controlling. Those cases are quite distinguishable. Had the plaintiffs in those cases been barred from suit, there would have been no available forum at all for their claims. *See McGlotten v. Connally*, 338 F. Supp. 448, 453-454 (DC 1972) (three-judge court) ("The preferred course of raising [such tax exemption and deduction] objections in a suit for refund is not available. In this situation we cannot read the statute to bar the present suit"). *See also Tax Analysts and Advocates v. Shultz*, 376 F. Supp. 889, 892 (DC 1974) ("Since plaintiffs are not seeking to restrain the collection of taxes, and since they cannot obtain relief through a refund suit, [26 U.S.C.] § 7421(a) does not bar the injunctive relief they seek"). The Court ratified those decisions only insofar as they relied on this limited rationale as the basis for an exception to the statutory bar on adjudication. *See South Carolina v. Regan*, 465 U.S. 367, 373, 79 L. Ed. 2d 372, 104 S. Ct. 1107 (1984) (holding the anti-injunction provision inapplicable to a State's challenge to the constitutionality of a federal tax exemption provision, § 103(a) of the Code (which exempts from a taxpayer's gross income the interest

earned on the obligations of any State), as amended by § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982, 96 Stat. 596, because "the [anti-injunction provision] was not intended to bar an action where . . . Congress has not provided the plaintiff with an alternative legal way to challenge the validity of a tax"). Even that strict limitation was not strict enough for four Members of the Court, one of whom noted "the broad sweep of the [a]nti-[i]njunction [provision]." 465 U.S., at 382, 79 L. Ed. 2d 372, 104 S. Ct. 1107 (Blackmun, J., concurring in judgment). The other three Justices went further still. They would have allowed an exception to the anti-injunction provision's literal bar on non-taxpayer suits challenging tax exemption provisions only if due process rights were at stake. *See id.*, at 394, 79 L. Ed. 2d 372, 104 S. Ct. 1107 (O'Connor, J., concurring in judgment) ("*Bob Jones University*'s recognition that the complete inaccessibility of judicial review might implicate due process concerns provides absolutely no basis for crafting an exception" to the anti-injunction Act for a plaintiff who has "no due process right to review of its claim in a judicial forum").

In contrast to the anti-injunction provision, the TIA on its own terms ensures an adequate forum for claims it bars. The TIA specially exempts actions that could not be heard in state courts by providing an exception for instances "where a plain, speedy, and efficient remedy may [not] be had in the courts of [the] State." 28 U.S.C. § 1341. The TIA's text thus

already incorporates the check that *Regan* concluded could be read into the anti-injunction provision even though "[t]he [anti-injunction provision]'s language 'could scarcely be more explicit' in prohibiting nontaxpayer suits like this one." 465 U.S., at 385, 79 L. Ed. 2d 372, 104 S. Ct. 1107 (O'Connor, J., concurring in judgment) (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736, 40 L. Ed. 2d 496, 94 S. Ct. 2038 (1974)). The practical effect is that a literal reading of the TIA provides for federal district courts to stand at the ready where litigants encounter legal or practical obstacles to challenging state tax credits in state courts. And this Court, of course, stands at the ready to review decisions by state courts on these matters.

The Court does not discuss this codified exception, yet the clause is crucial. It represents a congressional judgment about the balance that should exist between the respect due to the States (for both their administration of tax schemes and their courts' interpretation of tax laws) and the need for constitutional vindication. To ignore the provision is to ignore that Congress has already balanced these interests.

Respondents admit they would be heard in state court. Indeed a quite similar action previously was heard there. *See Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (1999). As a result, the TIA's exception (akin to that recognized by *Regan*) does not apply. To proceed as if it does is to replace Congress' balancing of the noted interests with the Court's.

III

The Court and respondents further argue that the TIA's policy purposes and relatedly the federal anti-injunction provision's policy purposes (as discerned from legislative histories) justify today's holding. The two Acts, they say, reflect a unitary purpose: "In both . . . Congress directed taxpayers to pursue refund suits instead of attempting to restrain [tax] collections." *Ante*, at 104, 159 L. Ed. 2d, at 187. *See also ante*, at 105, 159 L. Ed. 2d, at 189 (concluding that the Act's underlying purpose is to bar suits by "taxpayers who sought to avoid paying their tax bill"); *see also* Brief for Respondents 18-20. This purpose, the Court and respondents say, shows that the Act was not intended to foreclose relief in challenges to tax credits. The proposition rests on the premise that the TIA's sole purpose is to prevent district court orders that would decrease the moneys in state fiscs. Because the legislative histories of the Acts are not carefully limited in the manner that this reading suggests, the policy argument against a literal application of the Act's terms fails.

Taking the federal anti-injunction provision first, as has been noted before, "[its] history expressly reflects the congressional desire that all injunctive suits against the tax collector be prohibited." *Regan*, 465 U.S., at 387, 79 L. Ed. 2d 372, 104 S. Ct. 1107 (O'Connor, J., concurring in judgment). The provision responded to "the grave dangers which accompany intrusion of the injunctive power of the courts into the administration of the revenue." *Id.*, at 388, 79

L. Ed. 2d 372, 104 S. Ct. 1107. It "generally precludes judicial resolution of all abstract tax controversies," whether brought by a taxpayer or a nontaxpayer. *Id.*, at 392, 79 L. Ed. 2d 372, 104 S. Ct. 1107; *see also id.*, at 387-392, 79 L. Ed. 2d 372, 104 S. Ct. 1107 (reviewing the legislative history of the anti-injunction provision, its various amendments, and related enactments). Thus, the provision's object is not just to bar suits that might "interrupt 'the process of collecting . . . taxes,'" but "[s]imilarly, the language and history evidence a congressional desire to prohibit courts from restraining any aspect of the tax laws' administration." *Id.*, at 399, 79 L. Ed. 2d 372, 104 S. Ct. 1107.

The majority's reading of the TIA's legislative history is also inconsistent with the interpretation of this same history in the Court's earlier cases. The Court has made clear that the TIA's purpose is not only to protect the fisc but also to protect the State's tax system administration and tax policy implementation. *California v. Grace Brethren Church*, 457 U.S. 393, 73 L. Ed. 2d 93, 102 S. Ct. 2498 (1982), is a prime example.

In *Grace Brethren Church* the Court held that the TIA not only bars actions by individuals to stop tax collectors from collecting moneys (*i.e.*, injunctive suits) but also bars declaratory suits. *See id.*, 457 U.S., at 408-410, 73 L. Ed. 2d 93, 102 S. Ct. 2498. The Court explained that permitting declaratory suits to proceed would "defea[t] the principal purpose of the Tax Injunction Act: 'to limit drastically federal district

court jurisdiction to interfere with so important a local concern as the collection of taxes.'" *Id.*, 457 U.S., at 408-409, 73 L. Ed. 2d 93, 102 S. Ct. 2498 (quoting *Rosewell v. LaSalle Nat. Bank,* 450 U.S. 503, 522, 67 L. Ed. 2d 464, 101 S. Ct. 1221 (1981)). It continued:

> "'If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.'" *Grace Brethren Church, supra,* at 410, 73 L. Ed. 2d 93, 102 S. Ct. 2498 (quoting with approval *Perez v. Ledesma,* 401 U.S. 82, 128, n. 17, 27 L. Ed. 2d 701, 91 S. Ct. 674 (1971) (Brennan, J., concurring in part and dissenting in part)).

While this, of course, demonstrates that protecting the state fisc from damage is part of the TIA's purpose, it equally shows that actions that would throw the "state tax administration . . . into disarray" also implicate the Act and its purpose. The Court's concern with preventing administrative disarray puts in context its explanation that the TIA's principal

concern is to limit federal district court interference with the "collection of taxes." The phrase, in this context, refers to the operation of the whole tax collection system and the implementation of entire tax policy, not just a part of it. While an order interfering with a specific collection suit disrupts one of the most essential aspects of a State's tax system, it is not the only way in which federal courts can disrupt the State's tax system:

> "[T]he legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration." *Grace Brethren Church, supra,* at 409, n. 22, 73 L. Ed. 2d 93, 102 S. Ct. 2498.

The Court's decisions in *Fair Assessment in Real Estate Assn., Inc. v. McNary,* 454 U.S. 100, 70 L. Ed. 2d 271, 102 S. Ct. 177 (1981), *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n,* 515 U.S. 582, 132 L. Ed. 2d 509, 115 S. Ct. 2351 (1995) *(NPTC),* and *Rosewell, supra,* make the same point. Though the majority says these cases support its holding because they "involved plaintiffs who mounted federal litigation to avoid paying state taxes," *ante,* at 106, 159 L. Ed. 2d, at 189, the language of these cases is too clear to be ignored and is contrary to the Court's holding today. In *Fair Assessment,* the Court observed that "[t]he [TIA] 'has its roots in equity practice, in principles of federalism,

and in recognition of the imperative need of a State to administer its own fiscal operations.' This last consideration was [its] principal motivating force." 454 U.S., at 110, 70 L. Ed. 2d 271, 102 S. Ct. 177 (quoting *Rosewell, supra,* at 450 U.S., at 522, 67 L. Ed. 2d 464, 101 S. Ct. 1221, in turn quoting *Tully v. Griffin, Inc.*, 429 U.S. 68, 73, 50 L. Ed. 2d 227, 97 S. Ct. 219 (1976) (other citation omitted)). In *NPTC*, the Court said, "Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration. The passage of the [TIA] in 1937 is one manifestation of this aversion." 515 U.S., at 586, 132 L. Ed. 2d 509, 115 S. Ct. 2351 (summing up this aversion, generated also from principles of comity and federalism, as creating a "background presumption that federal law generally will not interfere with administration of state taxes," *id.,* at 588, 132 L. Ed. 2d 509, 115 S. Ct. 2351). In *Rosewell,* the Court described the Act's language as "broad" and "prophylactic." 450 U.S., at 524, 67 L. Ed. 2d 464, 101 S. Ct. 1221 (majority opinion of Brennan, J.). *See also ibid.* (the TIA was "passed to limit federal-court interference in state tax matters").

The Act is designed to respect not only the administration of state tax systems but also state court authority to say what state law means. "[F]ederal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts." *Grace Brethren Church, supra,* at 410, 73 L. Ed. 2d 93, 102 S. Ct. 2498 (internal quotation

marks omitted). *See also Rosewell, supra,* at 527, 67 L. Ed. 2d 464, 101 S. Ct. 1221. This too establishes that the TIA's purpose is not solely to ensure that the State's fisc is not decreased. There would be only a diminished interest in allowing state courts to say what the State's tax statutes mean if the Act protected just the state fisc. The TIA protects the responsibility of the States and their courts to administer their own tax systems and to be accountable to the citizens of the State for their policies and decisions. The majority objects that "there is no disagreement to the meaning of" state law in this case, *ante,* at 106, n. 8, 159 L. Ed. 2d, at 187. As an initial matter, it is not clear that this is a fair conclusion. The litigation in large part turns on what state law requires and whether the product of those requirements violates the Constitution. More to the point, however, even if there were no controversy about the statutory framework the Arizona tax provision creates, the majority's ruling has implications far beyond this case and will most certainly result in federal courts in other States and in other cases being required to interpret state tax law in order to complete their review of challenges to state tax statutes.

Our heretofore consistent interpretation of the Act's legislative history to prohibit interference with state tax systems and their administration accords with the direct, broad, and unqualified language of the statute. The Act bars all orders that enjoin, suspend, or restrain the assessment of any tax under

state law. In effecting congressional intent we should give full force to simple and broad proscriptions in the statutory language.

Because the TIA's language and purpose are comprehensive, arguments based on congressional silence on the question whether the TIA applies to actions that increase moneys a state tax system collects are of no moment. Contra, *Winn,* 307 F.3d, at 1017-1018 (relying on *Dunn v. Carey,* 808 F.2d 555, 558 (CA7 1986)); *see also ante,* at 108-109, 159 L. Ed. 2d, at 190 (relying on *Dunn*). Whatever weight one gives to legislative histories, silence in the legislative record is irrelevant when a plain congressional declaration exists on a matter. "[W]hen terms are unambiguous we may not speculate on probabilities of intention." *Insurance Co. v. Ritchie,* 72 U.S. 541, 5 Wall. 541, 545, 18 L. Ed. 540 (1867). Here, Congress has said district courts are barred from disrupting the State's tax operations. It is immaterial whether the State's collection is raised or lowered. A court order will thwart and replace the State's chosen tax policy if it causes either result. No authority supports the proposition that a State lacks an interest in reducing its citizens' tax burden. It is a troubling proposition for this Court to proceed on the assumption that the State's interest in limiting the tax burden on its citizens to that for which its law provides is a secondary policy, deserving of little respect from us.

IV

The final basis on which both the majority and respondents rest is that years of unexamined habit by litigants and the courts alike have resulted in federal courts' entertaining challenges to state tax credits. *See ante,* at 110-111, 159 L. Ed. 2d, at 191-192 (citing representative cases). While we should not reverse the course of our unexamined practice lightly, our obligation is to give a correct interpretation of the statute. We are not obliged to maintain the status quo when the status quo is unfounded. The exercise of federal jurisdiction does not and cannot establish jurisdiction. *See United States v. L. A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37-38, 97 L. Ed. 54, 73 S. Ct. 67 (1952). "[T]his Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio.*" *Id.,* at 38, 97 L. Ed. 2d 54, 73 S. Ct. 67. In this respect, the present case is no different than *Federal Election Comm'n v. NRA Political Victory Fund,* 513 U.S. 88, 130 L. Ed. 2d 439, 115 S. Ct. 537 (1994). The case presented the question whether we had jurisdiction to consider a certiorari petition filed by the Federal Election Commission (FEC), and not by the Solicitor General on behalf of the FEC. The Court held that it lacked jurisdiction. *See id.,* 99, 130 L. Ed. 2d 439, 115 S. Ct. 537. Though that answer seemed to contradict the Court's prior practices, the Court said:

> "Nor are we impressed by the FEC's argument that it has represented itself before this Court on several occasions in the

> past without any question having been raised about its authority to do so. . . . The jurisdiction of this Court was challenged in none of these actions, and therefore the question is an open one before us." *Id.*, at 97, 130 L. Ed. 2d 439, 115 S. Ct. 537.

*See also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63, n. 4, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989) ("'[T]his Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.' *Hagans v. Lavine*, 415 U.S. 528, 535, n. 5, [39 L. Ed. 2d 577, 94 S. Ct. 1372] (1974)" (alteration in original)). These cases make clear that our failure to consider a question hardly equates to a thing's being decided. Contra, *ante*, at 112-113, 159 L. Ed. 2d, at 193 (Stevens, J., concurring) (referring to prior silences of the courts with respect to the TIA as *stare decisis* and settled interpretation). As a consequence, I would follow the statutory language.

* * *

After today's decision, "[n]ontaxpaying associations of taxpayers, and most other nontaxpayers, will now be allowed to sidestep Congress' policy against [federal] judicial resolution of abstract [state] tax controversies." *Regan*, 465 U.S., at 394, 79 L. Ed. 2d 372, 104 S. Ct. 1107 (O'Connor, J., concurring in judgment). This unfortunate result deprives state courts of the first opportunity to hear such cases and to grant the relief the Constitution requires.

For the foregoing reasons, with respect, I dissent.

**KATHLEEN M. WINN, an Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, an Arizona taxpayer, Plaintiffs-Appellants,**

**v.**

**MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue, Defendant-Appellee.**

**No. 01-15901**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

*307 F.3d 1011; 2002 U.S. App. LEXIS 20811; 2002 Cal. Daily Op. Service 10135; 2002 Daily Journal DAR 11565*

**June 11, 2002, Argued and Submitted, San Francisco, California**

**October 3, 2002, Filed**

**COUNSEL:** Paul Bender, Esq., Arizona State University College of Law, Phoenix, Arizona, for the plaintiffs-appellants.

Patrick Irvine, Deputy Attorney General, Phoenix, Arizona for the defendant-appellee.

**JUDGES:** Before: Mary M. Schroeder, Chief Judge, Dorothy W. Nelson and Stephen Reinhardt, Circuit Judges. Opinion by Judge Reinhardt.

**OPINION BY:** Stephen Reinhardt, Circuit Judge.

## OPINION

REINHARDT, Circuit Judge:

This case raises the question of when the federal courts may entertain constitutional challenges to state tax laws. Appellants, who are Arizona residents and taxpayers, contend that an Arizona statute permitting tax credits for contributions that support parochial schools violates the Establishment Clause. The district court granted the state's motion to dismiss on the basis that the Tax Injunction Act divests the federal courts of subject matter jurisdiction in this case, and on the basis of general principles of comity and federalism. Neither the statute nor the doctrines relied on by the district court bar Appellants' action. Because Appellants do not challenge any of the types of procedures specified in the Tax Injunction Act, and because they seek to enjoin the granting of a tax credit, rather than the collection of state revenue, the action is justiciable in federal court.

## I. BACKGROUND

The statute at issue in this case is Arizona Revised Statute § 43-1089 (hereinafter "§ 1089"). Enacted in 1997, the law permits state tax credits for contributions to organizations called "school tuition organizations." ("STOs"). Section 1089 provides that STOs must be charitable organizations under § 501(c)(3) of the Internal Revenue Code. The tax credit program works as follows: Each Arizona taxpayer may receive a tax credit of up to $ 500 for the

amount of voluntary contributions he or she makes to STOs in any single year; married couples filing jointly may receive a credit of up to $ 625. § 1089(A)(1)-(2).

There are several limits on the activities of STOs. The organizations are required to spend at least 90% of their revenue on educational scholarships or grants for children in order to allow those children to attend a private school, including parochial schools. § 1089(E)(3). An STO is not permitted to dispense all of its scholarships or grants to students attending the same school; the statute provides that recipients of an STO's funds must be drawn from at least two different schools. *Id.* A taxpayer cannot request that a contribution to an STO be used for the direct benefit of his dependent. § 1089(D). Finally, an STO cannot distribute grants or scholarships to students who attend schools that discriminate on the basis of race, color, handicap, familial status, or national origin. § 1089(E)(2).

There are no other limits on how STOs operate; thus, an STO may distribute grants only to students attending Catholic schools, Protestant schools, Muslim schools, Jewish schools, or schools maintained by any other single religious sect. STOs may also limit their grants to children of families who belong to a particular faith – Catholic children, Protestant children, Muslim children, or Jewish children, for example. The total amount of funds available for STO grants (and the concomitant revenue loss to the state) is limited only by the number of taxpayers who elect

to contribute, rather than pay the amount of their contributions as taxes.

Appellants contend that the tax credit scheme is an impermissible government subsidy of religious schools in violation of the First and Fourteenth Amendments of the Constitution. They point out that under the tax credit system, a substantial amount of money that would otherwise be received by the state and be available for funding public education and other essential public services is diverted to religious institutions to be used for the promulgation of particular religious views. Appellants filed this action in February, 2000, seeking a declaration that the STO program violates the Establishment Clause of the First Amendment; they also requested an injunction both enjoining the future operation of the program, and requiring the return to the state's general fund of monies already distributed to (but not yet expended by) STOs.

In their complaint, plaintiffs described how the STO tax scheme has worked in practice:[1] In calendar year 1998, the first full year that the tax credit was in effect, STOs reported to the Arizona Department of Revenue that they had received $ 1.8 million in contributions. At least 94% of that amount was donated

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[1] Because the district court dismissed the case for lack of jurisdiction pursuant to Rule 12(b)(1), for purposes of this appeal the facts as stated in the complaint must be accepted as true. *Wilkins v. United States*, 279 F.3d 782, 784 n. 1 (9th Cir. 2002).

to STOs that restrict their scholarships or grants to students attending religious schools; three religious STOs received 85% of the donations made that year. The principal beneficiary of the funds that otherwise would have been paid to the state as tax revenues was the Catholic Diocese of Phoenix.[2] The program expanded significantly in 1999, its second year of operation; according to plaintiffs, the Catholic Diocese of Phoenix alone received $ 4.5 million for its STO that year, and the Catholic Diocese of Tucson reported more than $ 850,000 in donations as a result of the tax scheme.

The STO program was challenged in the Arizona courts as soon as it was enacted. The program was upheld as constitutional by the Arizona Supreme Court, in a 3-2 decision. *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921, 120 S. Ct. 283, 145 L. Ed. 2d 237 (1999). Plaintiffs assert that principles of res judicata do not bar the instant action, and defendants have not raised a

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[2] The largest single recipient in 1998 was the Catholic Tuition Organization of the Diocese of Phoenix, which received $ 837,140 of the $ 1.8 million in diverted funds. That organization provides tuition assistance to students attending Catholic schools run by the Catholic Diocese of Phoenix. The second largest single recipient was an STO that restricts its grants to students attending evangelical Christian schools. The third was an STO that restricts its grants to Brophy College Preparatory School, a Catholic all-boys' high school, and its sister school, Xavier College Preparatory School for girls.

res judicata defense either here or in the district court.

Arizona[3] moved to dismiss the complaint on two grounds: (1) on the basis of Eleventh Amendment immunity; and (2) on the basis of a lack of subject matter jurisdiction resulting from the Tax Injunction Act, 28 U.S.C. § 1341, as well as from principles of comity. Simultaneously, a number of parties sought intervention in the lawsuit. The district court granted the motion to dismiss on the ground that the Tax Injunction Act as well as comity preclude federal jurisdiction over plaintiffs' claim; it did not rule on either the motions to intervene or the Eleventh Amendment argument. A timely appeal was filed.

## II. DISCUSSION

### A. Tax Injunction Act

The Tax Injunction Act precludes district courts from interfering with a state's "assessment, levy, or collection" of state taxes where an efficient remedy is

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[3] The nominal defendant in this action is Mark W. Killian, who is sued in his official capacity as Director of the Arizona Department of Revenue. For simplicity, in this opinion we refer to the defendant as "Arizona."

available in state court.[4] Arizona does not contend that any relief that the district court might order in this case would interfere with a "levy" or "collection" of any taxes. Rather, it asserts that the Tax Injunction Act bars this action because the STO tax credit is part of Arizona's general system of tax "assessment." In other words, according to Arizona, the tax credit is part of the overall calculus by which the state determines how much revenue it will receive from each taxpayer. This broad reading of the word "assessment," however, is supported neither by any precedent interpreting "assessment" in this manner, nor by the meaning of the word itself. The term "assessment" has two definitions relevant to the question presented in this case: (1) "to estimate officially the value of (property, income, etc.) as a basis for taxation," and (2) "to impose a tax or other charge on." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 90 (1979). Neither definition of the term describes the role of the STO tax credit in the Arizona tax system: (1) the STO credit available to a taxpayer is a uniform amount that is applied to the calculation of taxes *after* a taxpayer's gross income has been determined and therefore plays no part in the "assessment" of property or income as

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[4] The Tax Injunction Act provides in its entirety as follows:

> The District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

28 U.S.C. § 1341.

a basis for the imposition of taxes,[5] and (2) the challenged practice is not the imposition of a tax; quite the contrary, it is the grant of a benefit in the form of an excuse from paying a portion of the taxes already assessed.

The district court agreed with Arizona's contention that the STO credit constitutes a "tax assessment," and that this action is consequently barred. It stated that *Blangeres v. Burlington Northern, Inc.*, 872 F.2d 327, 328 (9th Cir. 1989), compelled its conclusion. *Blangeres,* however, involved a federal lawsuit in which individuals sought to prevent a company from disclosing documents that were necessary

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[5] All taxpayers, regardless of their tax bracket or adjusted gross income, may receive up to the standard sums of either $ 500 or $ 625 in tax credits for STO contributions (depending on the taxpayer's filing status and the amount of his contributions to STOs). Whatever a taxpayer contributes to an STO is subtracted directly from his tax bill *after* his income is assessed and his tax liability calculated. From a purely financial perspective, then, a taxpayer is unaffected by his decision as to whether or not to make an STO contribution. The funds that he may contribute will be unavailable to him in any event: they will be used either to make the contribution or to pay the taxes he owes. We note that a tax credit differs from a tax deduction in that where a tax deduction is involved, giving money to a religious institution is not, as is the case of a tax credit, a free gift. In the case of a tax credit, the taxes due are reduced by the full amount of the gift. In contrast, when a taxpayer is entitled to a tax deduction, the taxpayer must in most if not all instances still pay a majority of the tax involved: it is only his taxable income that is reduced by the amount of the gift, and, thus, his tax liability is reduced only by a percentage of the gift that is equal to the tax rate applicable to his income bracket.

to the state's valuation of certain taxable assets belonging to a corporation. Thus, the suit affected the state's ability to determine the value of a taxpaying entity's taxable income, or to "assess" the assets as the term is defined in the first of the two definitions set forth above. In short, *Blangeres* held that a lawsuit challenging the methods by which the state obtains information used for the valuation of taxable property is barred by the Tax Injunction Act, because any relief would prevent the state from accurately assessing taxes. *Blangeres* does not support defendant's argument here.

Moreover, if plaintiffs were to receive the relief that they seek in this action, there would be no violation of the purposes or policy underlying the Tax Injunction Act. Congress sought to implement two purposes when it passed the Act in 1937. They are well-documented in both the legislative record and in subsequent cases. *See, e. g., Aluminum Co. v. Department of Treasury*, 522 F.2d 1120, 1124 (6th Cir. 1975); *Hargrave v. McKinney*, 413 F.2d 320, 326 (5th Cir. 1969). The first purpose, which is not relevant to the instant appeal, involves the discriminatory effect of diversity jurisdiction in tax cases.[6]

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[6] Congress sought to eliminate an advantage that existed for foreign parties: prior to passage of the Act, such individuals or corporations could sue a state for injunctive relief in federal court on the basis of diversity jurisdiction and avoid paying the disputed tax until the challenge was resolved. In contrast, state residents – because they are not diverse – were forced to seek

(Continued on following page)

The second, more relevant purpose was to prevent disruption of a state's efforts to collect tax revenues. That concern is clearly expressed in the committee reports prepared when the Act was under consideration in Congress:

> The existing practice of the Federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign corporations doing business in such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt state and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy.

S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937). See also *Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503, 67 L. Ed. 2d 464, 527, 101 S. Ct. 1221 (1981) (explaining

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redress only in state courts, which typically required a party to pay a disputed tax first, and challenge it thereafter. S. Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937).("If those to whom the federal courts are open may secure injunctive relief against the collection of taxes, the highly unfair picture is presented of the citizen of the State being required to pay first and then litigate, while those privileged to sue in the federal courts need only pay what they choose and withhold the balance during the period of litigation.").

that if injunctive relief prohibiting the collection of a state tax was available, then "during the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency."); RICHARD H. FALLON, ET AL, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 1216-17 (4th ed. 1996) (In passing the Tax Injunction Act, Congress was "concerned that taxpayers, with the aid of a federal injunction, could withhold large sums, thereby disrupting governmental finances.").

We have not previously addressed the scope of the Tax Injunction Act with respect to suits challenging tax credits. We have, however, recognized on a number of occasions that a fundamental concern of the Act is ensuring that state coffers do not become bare as a result of federal court injunctive action. For instance, in *Dillon v. State of Montana,* 634 F.2d 463 (9th Cir. 1980), we held that a refund action was barred by the Tax Injunction Act because a federal court order requiring a state to grant a tax refund is functionally equivalent to an order preventing the collection of taxes. When determining whether federal court injunctive action is permissible under the Act, *Dillon* stated that a federal court is to look at "the practical effect on state fiscal operations" of the federal court order that plaintiffs seek. *Id.* at 466. *See also Poer & Co., et al. v. Counties of Alameda, et al.,* 725 F.2d 1234, 1235 (9th Cir. 1984) (holding that

jurisdiction does not exist to entertain an action for an injunction that would result in a tax refund). We applied the same "practical" approach in *Bidart Brothers v. California Apple Commission*, 73 F.3d 925, 930 (9th Cir. 1996), in which we held that certain state agency fees did not constitute "taxes" for purposes of the Act, principally because they were not "assessments that if enjoined would threaten the flow of central revenues of state governments. . . ."

Applying that functional analysis here, we hold that a federal action challenging the granting of a state tax credit is not prohibited by the Tax Injunction Act. The invalidation of a tax credit, such as the one at issue here, does not adversely affect the state's ability to raise revenue. If the STO tax scheme were to be struck down on Establishment Clause grounds, Arizona's ability to raise revenue would not be diminished; to the contrary, it would be enhanced. Thus, if the district court were ultimately to rule for the plaintiffs on the merits, the Act's primary policy of non-interference with state revenue collection would not be undermined in any way.

Arizona essentially argues that the Tax Injunction Act bars *any* federal litigation regarding the constitutionality of state taxes. Even if the STO tax credit is not an assessment, Arizona argues, the Tax Injunction Act's general policy of non-interference with state tax matters counsels against allowing this action to proceed. Such a broad reading of the Act is inconsistent with our precedent, the language of the Act, the legislative purpose set forth above, and the

federal courts' role as "guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242, 32 L. Ed. 2d 705, 92 S. Ct. 2151 (1972).

We agree with the interpretation of the Tax Injunction Act adopted by the Seventh Circuit. That court, like ours, applies a searching analysis of the *effect* of federal litigation on the state's ability to collect revenues, and will only bar the adjudication of a federal constitutional claim in federal court if a judgment for the plaintiffs will hamper a state's ability to raise revenue. *Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1986).[7] In *Dunn*, the plaintiffs' requested relief, as here, would have resulted in the state's collecting more tax revenue than it would have otherwise. The

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[7] We note that the Sixth Circuit in *In Re Gillis*, 836 F.2d 1001 (6th Cir. 1988), gave a different reading to the Tax Injunction Act. In *Gillis*, the court stated that if a suit "unduly intrudes on administration of the State's tax system," then it is precluded by the Act. *Id.* at 1009. In that case, the plaintiffs challenged Kentucky's system of tax assessment of coal, oil, and gas interests, charging that such properties were systematically underassessed for tax purposes. The *Gillis* plaintiffs contended that their claims were not foreclosed by the Tax Injunction Act because if they prevailed, it would lead to *increased* tax revenues for the state. The Sixth Circuit rejected this argument, taking a broad view of the scope of the Act's limit on federal court jurisdiction. Nevertheless, despite its broad language, the Sixth Circuit's decision is distinguishable from the case before us, because the court in *Gillis was* asked to do precisely what the Tax Injunction Act forbids – to interfere with a state's "*assessment*" of a tax, one of the three state functions specified in § 1341. Here no interference with any of the functions specified in the statute is involved.

Seventh Circuit held that for that reason the action was not barred by the Tax Injunction Act, and rejected a broad interpretation of the Act that would govern "any federal litigation touching on the subject of state taxes." *Id.* at 558. *Dunn* continued: "the text of [the Act] does not suggest that federal courts should tread lightly in issuing orders that might allow local governments to raise additional taxes." *Id.* The same holds true here where Appellants' requested relief would result in the elimination of a tax credit – and, accordingly, produce more revenues for Arizona.[8]

In sum, we hold that because plaintiffs attack the grant of a tax credit, which is not one of the three types of state tax procedures barred from challenge in

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[8] The reported cases factually most similar to this one are two district court cases. In *Rojas v. Fitch*, 928 F. Supp. 155 (D.R.I. 1996), affirmed on other grounds, 127 F.3d 184 (1st Cir. 1997), the court held that an Establishment Clause challenge to a state tax exemption was *not* barred by the Tax Injunction Act. It held:

> It is clear from the very text of the statute that it is not applicable in this instance. The present action is not an action to "enjoin, suspend or restrain" the collection of taxes. In fact it is quite the opposite. This is, in essence, an action to compel the State of Rhode Island to collect taxes.

928 F. Supp. at 159. *See also Moton v. Lambert*, 508 F. Supp. 367, 368 (N.D. Miss. 1981) (plaintiffs' challenge to a tax exemption for racially segregated schools is not barred by the Tax Injunction Act because, if successful, would have the effect of increasing state revenues).

federal court by the Tax Injunction Act, the district court erred in dismissing the action pursuant to that Act. Equally important, the relief requested by plaintiffs in this action would not hinder Arizona in its ability to impose taxes or collect revenue, but in fact would result in the state's receiving more funds that could be used for the public benefit. The Tax Injunction Act does not preclude federal courts from taking actions designed to increase the revenues available to the states, nor to remove unconstitutional barriers to the states' collection of the full amount of taxes they have levied or assessed.

B. Comity

The district court held as an alternative ground for its dismissal of this action that principles of comity preclude lawsuits involving potential federal court interference in the administration of state tax systems. The district court held that a federal court action that disrupts the domestic tax policy of a state is barred by principles of comity, regardless of whether the action relates to the collection of taxes, to tax deductions, or to tax credits. This broad bar to the litigation of federal constitutional claims in federal court is unsupported by precedent, and we reject it.

The Supreme Court has twice held federal jurisdiction to be barred by the doctrine of comity in cases in which state tax measures were challenged. Both, however, are cases in which the plaintiffs sought to

stop the collection of a tax; thus, they are fundamentally different from the instant case.

In the first, *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 87 L. Ed. 1407, 63 S. Ct. 1070 (1943), the plaintiffs challenged a Louisiana tax on dormant commerce clause grounds, and sought a declaration that it was invalid. Although the then-newly-passed Tax Injunction Act only bars injunctive relief by federal courts, the Supreme Court held that the Act merely codified preexisting principles of comity that prevent interference with the states' collection of revenue. Thus, comity required the dismissal of the declaratory judgment action for the same reason the Tax Injunction Act was enacted. *Id.* at 297. "[T]he federal courts, in the exercise of the sound discretion which has traditionally guided courts of equity in granting or withholding the extraordinary relief which they may afford, will not ordinarily restrain state officers *from collecting state taxes* where state law affords an adequate remedy to the taxpayer." *Id.* (citing *Matthews v. Rodgers*, 284 U.S. 521, 76 L. Ed. 447, 52 S. Ct. 217 (1932)) (emphasis added).

Arizona cites isolated statements from *Great Lakes* in support of its broad theory of comity. Such dicta is of limited significance. For instance, it is true that in *Great Lakes*, the Court stated that "[i]t is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states." 319 U.S. 298. This statement alone, however, does not warrant

expanding the doctrine of comity from precluding actions that affect the ability of states to raise revenue, to precluding *all* actions that relate to state tax administration, including actions designed to prevent the violation by the states of fundamental First Amendment guarantees. Indeed, the statement on which the state relies is generally applicable to any constitutional challenge to state law in federal court. It is not limited to state tax cases. Surely, the dicta did not mean that federal courts should not protect the constitutional rights of individuals against the implementation of unlawful state policies. Further, the dicta states only that federal courts should not "needlessly obstruct" state domestic policies. Ordinarily, however, when the policies that the state is enforcing are unconstitutional, precluding their application is not "needless" but necessary.

The second of the Supreme Court's comity cases involving the constitutionality of state tax laws is *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 70 L. Ed. 2d 271, 102 S. Ct. 177 (1981). There, plaintiffs alleged that a state's property tax assessment procedures did not comport with due process, and sought damages from the tax collectors pursuant to 42 U.S.C. § 1983. The Supreme Court held the suit to be barred by comity principles. Although the action was not directly prohibited by the Tax Injunction Act because plaintiffs sought damages under § 1983 rather than injunctive relief, the Court held that "petitioner's action would 'in every practical sense operate to suspend collection of the state

taxes. . . .'" 454 U.S. at 115 (quoting *Great Lakes*, 319 U.S. at 299).

In *McNary*, as in *Great Lakes*, the federal action was dismissed because it would have hindered the state's ability to collect revenue. In particular, the *McNary* Court expressed concern that a judgment for plaintiffs would have had a significant ripple effect on a number of state tax provisions that depended on the challenged assessment procedure, and would have unduly constrained the activities of state officials implementing that procedure due to the fear of potential liability under § 1983, as well as an aversion to the burden of defending § 1983 actions. In contrast, an ultimate judgment on the merits for plaintiffs here – much less the conduct of this litigation – would have no effect at all on the implementation of any other Arizona tax provisions, nor would it chill the activities of Arizona tax collectors. The STO credit is a limited, discrete portion of the Arizona tax code that, if invalidated, would not substantially affect the administration of taxes in other ways, and would, in fact, produce substantial additional revenue for the state. Although it, like any state statute, expresses the policy views of the state of Arizona, and thus should not be lightly disregarded, in this case Arizona identifies no harm that renders federal court review of this statute any more intrusive on the state's sovereignty than the review of any other state statute that is alleged to be unconstitutional. Accordingly, comity does not bar plaintiffs' attempt to vindicate the important constitutional rights at issue.

## CONCLUSION

Because both the Tax Injunction Act and the doctrine of comity, as it has been applied to federal tax cases involving state tax laws, are primarily concerned with federal litigation that interferes with the ability of the states to raise necessary tax revenues, they are inapplicable here. Accordingly, we REVERSE the district court's grant of Arizona's motion to dismiss and REMAND the case for further proceedings.

**REVERSED and REMANDED**

**KATHLEEN M. WINN, an Arizona taxpayer; DIANE WOLFTHAL, an Arizona taxpayer; MAURICE WOLFTHAL, an Arizona taxpayer LYNN HOFFMAN, an Arizona taxpayer, Plaintiffs-Appellants, v. ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION; ARIZONA SCHOOL CHOICE TRUST; LUIS MOSCOSO; GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue; GLENN DENNARD, Defendants-Appellees.**

**No. 05-15754**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

***2009 U.S. App. LEXIS 23077***

**October 21, 2009, Filed**

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**JUDGES:** Before: Dorothy W. Nelson, Stephen Reinhardt and Raymond C. Fisher, Circuit Judges. Order; Concurrence by Judge Pregerson; Concurrence by Judge D.W. Nelson; Dissent by Judge O'Scannlain. D.W. NELSON, REINHARDT and FISHER, Circuit

Judges, concurring in the denial of rehearing en banc. O'SCANNLAIN, Circuit Judge, dissenting from the denial of rehearing en banc, joined by KOZINSKI, Chief Judge, KLEINFELD, GOULD, TALLMAN, BYBEE, BEA, and N.R. Smith, Circuit Judges.

## OPINION

ORDER

Judges Reinhardt and Fisher voted to reject the petitions for rehearing en banc and Judge Nelson so recommended.

The full court was advised of the petitions for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The three petitions for rehearing en banc, filed May 14, 2009, are **denied**.

**CONCUR BY:** PREGERSON; D.W. NELSON, REINHARDT and FISHER.

## CONCUR

PREGERSON, Circuit Judge, concurring:

For the reasons stated by the panel in its concurrence, I also concur in the denial of rehearing en banc.

D.W. NELSON, REINHARDT and FISHER, Circuit Judges, concurring in the denial of rehearing en banc:

A majority of the active judges of our court declined to vote for rehearing of this case en banc. We concur in the court's decision not to go en banc.

The State of Arizona finances private "school tuition organizations" (STOs) by giving dollar-for-dollar tax credits to individuals who contribute to them. On its face, the statute creating this subsidy requires STOs to provide scholarships for students "to attend *any* qualified school of their parents' choice." Ariz. Rev. Stat. Ann. § 43-1089(G)(3) (2005) (emphasis added).[1] As the Arizona Department of Revenue applies the statute, however, the state reimburses contributions to STOs that restrict their scholarships to use at religious schools. Consequently, 85 percent or more of the state-financed scholarship money is available only to students whose parents are willing to send them to sectarian institutions.[2]

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[1] All references to "Section 1089" refer to the program as set forth in Arizona Revised Statutes Annotated § 43-1089 (2005), the version of the statute in place when plaintiffs' complaint was filed. Any differences between this and the current version of Section 1089 are not significant for purposes of the analysis.

[2] The dissent sees no constitutional distinction between a tax deduction and a tax credit. *See* Dissent 14721 n.3. We disagree. A tax-credit eligible contribution to an STO costs the taxpayer nothing. *See Winn v. Killian*, 307 F.3d 1011, 1015 n.5 (9th Cir. 2002), *aff'd sub. nom Hibbs v. Winn*, 542 U.S. 88, 124

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If these facts are proved true, the Arizona Department of Revenue's execution of the scholarship program (Section 1089) violates the Establishment Clause. In *Zelman v. Simmons-Harris,* 536 U.S. 639, 122 S. Ct. 2460, 153 L. Ed. 2d 604 (2002), the Court upheld a school voucher program that "provide[d] assistance directly" to parents without regard for religion, and public funds reached religious institutions only as the result of parents' choices about their children's education. *Id.* at 652. Parents received aid whether or not they were willing to enroll their children in sectarian schools, so the program did not exert pressure on parents to choose religious schools. Under the Arizona program, by contrast, taxpayers, rather than parents, direct funds to religious organizations. Access to assistance is restricted on the basis of religion, creating financial incentives that may skew parents' choices toward religious schools. *See id.* at 650. The differences between the Ohio and Arizona programs are constitutionally meaningful.

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S. Ct. 2276, 159 L. Ed. 2d 172 (2004) ("From a purely financial perspective, . . . a taxpayer is unaffected by his decision as to whether or not to make an STO contribution. The funds that he may contribute will be unavailable to him in any event: they will be used either to make the contribution or to pay the taxes he owes."). Tax deductible contributions, by contrast, impose a cost on the taxpayer. *See id.* ("[W]hen a taxpayer is entitled to a tax deduction, the taxpayer must in most if not all instances still pay a majority of the tax involved[.]"). Whereas a tax deduction would lower the cost of contributions to STOs, a dollar-for-dollar tax credit reduces that cost to zero, in effect allowing individual taxpayers to directly allocate public funds.

The dissent from rehearing en banc demonstrates that others may prefer a more expansive reading of *Zelman*. Careful review of the two cases, however, shows why the dissent's argument that "*Winn* cannot be squared with the Supreme Court's mandate in *Zelman*" is not persuasive. Dissent 14719-20.

## I. Background

On its face, Section 1089 appears to provide for parental choice. The statute says that for an organization to qualify as an STO eligible to receive state-reimbursed contributions the organization must provide scholarships "to children to allow them to attend *any* qualified school *of their parents' choice.*" Ariz. Rev. Stat. Ann § 43-1089(G)(3) (emphasis added).[3] If this were how Arizona applied the statute, the Arizona program would be similar to the majority of the tax credit programs currently in operation. Like Section 1089, four of these programs contain provisions directing scholarship organizations to provide scholarships for students to attend *any*

[3] A "qualified school" is defined by statute as "a nongovernmental primary school or secondary school or a preschool for handicapped students that is located in this state, that does not discriminate on the basis of race, color, handicap, familial status or national origin and that satisfies the requirements prescribed by law for private schools in this state." *Id.* § 43-1089(G)(2).

qualified school of their parents' choice.[4] These "parental choice" clauses may explain the apparent absence of any Establishment Clause challenges to those programs.

This is not, however, how the Arizona Department of Revenue applies the statute. According to plaintiffs' complaint, Arizona gives tax credits reimbursing individuals who contribute to STOs that expressly restrict their scholarships to use at religious schools. The largest STO, the Catholic Tuition Organization of the Diocese of Phoenix, restricts its scholarships to use at Catholic schools in the Phoenix Diocese; the second largest, the Arizona Christian School Tuition Organization provides scholarships only to students attending evangelical Christian schools; and the third largest, Brophy Community Foundation, restricts its scholarships to use at two specific Catholic schools. *See Winn*, 562 F.3d at 1006. As a result of how the Arizona Department of Revenue applies Section 1089, plaintiffs allege, these three religious STOs controlled 85 percent of the total STO donations in 1998, the year before the complaint was filed. *See id.* at 1006. Plaintiffs argue that it is this application of Section 1089 that violates the Establishment Clause.

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[4] *See* Fla. Stat. § 220.187(6)(h); Ga. Code Ann. § 20-2A-1(3)(A); Ind. Code § 20-51-3-1(b); Iowa Code § 422.11S(5)(c)(1); R.I. Gen. Laws § 44-62-2(a). One of the currently operating programs contains no such parental choice provision. *See* 24 Pa. Stat. Ann. § 20-2005-B.

## II. Effect

We turn first to the issue of "whether Section 1089 'has the forbidden "effect" of advancing or inhibiting religion.'" *Winn*, 562 F.3d at 1012 (quoting *Zelman*, 536 U.S. at 649).

### A. Parental Choice

The *Winn* panel held that the Arizona Department of Revenue's application of Section 1089 may not provide parents with "true private choice" within the meaning of *Zelman*. *See id.* at 1015-18. With respect to this conclusion, the dissent accuses the panel of rejecting the majority's holding in *Zelman* in favor of Judge Souter's dissent. Not so.

#### 1.

The dissent fails to address the crucial difference between the Ohio voucher program upheld in *Zelman* and the Arizona Department of Revenue's application of Section 1089: with respect to religion, the Ohio program gave parents *equal access* to tuition benefits. *See Zelman*, 536 U.S. at 645. Under the Ohio program, the state provided tuition aid on the basis of financial need, without regard to religion, and eligible parents were free to apply the aid toward any private school, religious or secular, or toward a public school outside the district willing to participate in the program (though none was). If a parent decided to send her child to a private school, the state wrote a check made payable to the parent, which the parent

could then endorse over to her chosen school. *See id.* at 646. Crucially, a parent's choice to send her child to a religious school would *neither help nor harm* her chance of receiving tuition aid.

Whether such a program violates the Establishment Clause, the Court held, does not depend on whether the parent receiving tuition aid has a broader array of religious than secular schools to choose from. This is because "[t]he constitutionality of a *neutral* educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." *Id.* at 658 (emphasis added). The majority in *Zelman* made clear, however, that a "neutral educational aid program" – or, as the Court also put it, a "program of true private choice" – is one that grants *access* to benefits without regard to religion. *Id.* at 658, 662.

The importance of providing equal access to benefits is emphasized throughout *Zelman*. A common thread running through indirect aid programs the Supreme Court has upheld against Establishment Clause challenges, the *Zelman* Court observed, is that they have been "*neutral* with respect to religion[ ] and provide[d] assistance *directly* to a broad class of citizens." *Id.* at 652 (emphases added); *see also Mueller*, 463 U.S. at 397; *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487, 106 S. Ct. 748, 88 L. Ed. 2d 846 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 113 S. Ct. 2462, 125 L. Ed. 2d 1

(1993).[5] Likewise, under the Ohio voucher program, the Court stressed, "[p]rogram *benefits* are available to participating families *on neutral terms*, with no reference to religion." *Zelman*, 536 U.S. at 653 (emphases added).

By contrast, as plaintiffs allege the Arizona Department of Revenue applies the statute, access to Section 1089 – funded scholarships is not "available . . . on neutral terms, with no reference to religion." Parents who are unwilling to send their child to a religious school may be denied access to program benefits because, as plaintiffs allege, there are not a sufficient number of scholarships available for use at secular schools. Accordingly, these parents are shut out of the program altogether, and at the very least their chances of receiving benefits are harmed by their choice to send their child to a secular school.

This lack of access on a religiously neutral basis explains why Section 1089 as operated by the Arizona Department of Revenue would violate the Establishment Clause. This conclusion is entirely consistent

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[5] The program upheld in *Mueller*, *Zelman* explained, provided aid to "'*all* parents'" to pay for certain educational expenses at secular or religious schools. *Zelman*, 536 U.S. at 650 (quoting *Mueller*, 463 U.S. at 397). Under the program in *Witters*, *Zelman* continued, "*recipients* generally were empowered to direct the aid to schools or institutions *of their own choosing*." *Id.* at 651 (emphases added). Likewise, the program upheld in *Zobrest* "'distribute[d] benefits *neutrally to any child* qualifying as disabled,'" without regard to religion. *Id.* (emphasis added) (quoting *Zobrest*, 509 U.S. at 10).

with – and required by – the Court's analysis in *Zelman*. It is true that the majority in *Zelman* rejected Justice Souter's view that the number of religious and secular schools participating in the Ohio voucher program was relevant to its constitutionality. But before the Court addressed Justice Souter's concerns, it first identified several features of the Ohio program that made it one of "true private choice . . . , and thus constitutional." *Id.* Among these features, the tuition aid distributed under the Ohio program created "no 'financial incentives' that 'skew[ed]' the program toward religious schools." *Id.* (alteration omitted) (quoting *Witters*, 474 U.S. at 487-88). The Court recognized that "[s]uch incentives 'are not present where the aid is *allocated* on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is *made available to both religious and secular beneficiaries on a nondiscriminatory basis.*'" *Id.* at 653-54 (emphasis added, alteration and ellipses omitted) (quoting *Agostini v. Felton*, 521 U.S. 203, 231, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)).

The Arizona Department of Revenue permits scholarships funded under Section 1089 *not* to be "made available to both religious and secular beneficiaries on a nondiscriminatory basis." Therefore, *Zelman* requires a closer look at whether the program, as applied, creates "financial incentives that skew the program toward religious schools." *Id.* at 653 (alterations and internal quotation marks omitted). This is why it is relevant that, by allowing tax credits for contributions to discriminatory STOs,

the Arizona Department of Revenue has created an overwhelming disparity in the number of scholarships exclusively available for use at religious schools compared to the number available for use at secular schools. *See Winn*, 562 F.3d at 1016-18.

Consistent with Section 1089's parental choice provision, *see* Ariz. Rev. Stat. Ann. § 43-1089 (2005), the Arizona Department of Revenue *could* apply the program to require that STOs make state-funded scholarships "available to both religious and secular beneficiaries on a nondiscriminatory basis." *Zelman*, 536 U.S. at 653-54 (internal quotation marks omitted). If Section 1089 were applied in this neutral manner, data concerning the number of scholarships applied toward religious schools versus secular schools would indeed be irrelevant to the Establishment Clause inquiry as long as the State of Arizona otherwise provided students "a range of [secular] educational choices." *Id.* at 655.

As Section 1089 is currently applied, however, the program allows state-funded scholarships to be restricted to use at religious schools. It is therefore necessary to consider whether, in reality, the program creates incentives for parents to send their children to religious schools in order to gain access to benefits. This conclusion is required by – and, at the very least, consistent with – *Zelman*.[6]

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[6] The dissent's hypothetical, about a world in which Section 1089 operates to restrict scholarships to use at secular schools,

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The dissent contends that the Arizona program is valid because the State of Arizona has *other* programs in place that provide secular educational options for those unable to obtain a program scholarship. *See Zelman*, 536 U.S. at 655-56 ("The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to *obtain* a program scholarship and then choose a religious school." (emphases added)). The dissent fails to recognize *Zelman*'s holding that a program of "true private choice" is one in which "[p]rogram benefits are available to participating families on neutral terms, with no reference to religion." *Id.* at 653. A short hypothetical will show why the dissent's reading of *Zelman* is untenable. Consider a program, instituted by a state that provides an array of secular educational options, that offers tax deductions exclusively to parents sending their

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is premised on the misunderstanding that, under the Free Exercise Clause, governments have an affirmative obligation to fund religious educational options if they decide to make secular options available. *See* Dissent 14725-26. *But see Locke v. Davey*, 540 U.S. 712, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004) (rejecting Free Exercise challenge to statute providing postsecondary education scholarships but prohibiting use of the scholarships for a degree in devotional theology from a religious institution). Constitutional limitations on support for religion do not precisely mirror limitations on failures to support religion.

children to private schools. Each eligible parent receives a tax deduction unrelated to the amount spent on tuition, thus ensuring a windfall to parents who send their children to religious schools, which typically charge lower rates than secular private schools. Assume this hypothetical program has a valid secular purpose. For most potential recipients, however, benefits under the program are, as a practical matter, available only if the recipient chooses to send her child to a relatively low-cost religious school. Thus, the unmistakable effect of the program is to create special incentives to send one's child to a sectarian school.

Under the dissent's reading of *Zelman*, this hypothetical program would easily withstand an Establishment Clause challenge. Anyone can participate in the program. Anyone who participates receives identical tax benefits. Anyone can apply the tax benefits toward a private school of his or her choice. *See* Dissent 14722. Moreover, for those who choose not to participate in the program, the state provides an array of public schooling options. *See id.* at 14732-33.

This program is not a hypothetical; it is the New York tax deduction scheme invalidated in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973) – a case that *Zelman* distinguished but declined to

overturn.[7] *See Nyquist*, 413 U.S. at 788 ("In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one 'advancing' religion."); *Zelman*, 536 U.S. at 661 (observing that the "'function'" of the New York program "was '*unmistakably* to provide desired financial support for nonpublic, sectarian institutions'" (quoting *Nyquist*, 413 U.S. at 783 (emphasis added))). *Zelman* explained that *Nyquist* had "expressly reserved judgment with respect to 'a case involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted.'" *Id.* (quoting *Nyquist*, 413 U.S. at 782-83). The Ohio voucher program fit this

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[7] The New York program also had provisions offering private school tuition reimbursements, paid directly to the school, for parents who fell below a certain income level and grants to private schools for the maintenance and repair of their facilities. The Court treated each provision of the program as severable and held that each provision separately violated the Establishment Clause. *See Nyquist*, 413 U.S. at 761-65. Nothing in *Zelman* suggests the Court would have upheld the tax deduction provision of the New York program if it had been considered in isolation. *See Zelman*, 536 U.S. at 661 (observing that New York program "gave a package of benefits exclusively to private schools and the parents of private school enrollees" and "provided tax benefits 'unrelated to the amount of money actually expended by any parent on tuition,' ensuring a windfall to parents of children in religious schools" (quoting *Nyquist*, 413 U.S. at 790)).

description. The Arizona Department of Revenue's application of Section 1089 does not.

In *Zelman,* the Court clarified that "*Nyquist* does not govern neutral educational assistance programs that . . . offer aid directly to a broad class of individual recipients defined without regard to religion." *Id.* at 662. According to the dissent, Section 1089 is such a "neutral educational assistance program." By the dissent's logic, however, the New York program invalidated in *Nyquist* would also be such a program. Even more troublesome, a program that provided tax deductions exclusively to parents sending their children to *religious* schools would also constitute a "neutral educational assistance program" as long as the state had other programs in place that provided secular educational options. It is this result, not the outcome in *Winn,* "that simply cannot be reconciled with *Zelman.*" Dissent 14724. The Supreme Court elected not to overturn *Nyquist,* and we may not do so on its behalf.

### B. Taxpayer Choice

Next, the dissent challenges the panel's conclusion that the choices provided to *taxpayers* under Section 1089 – choices that, plaintiffs allege, restrict *parents*' access to secular educational scholarships – fail to render the program constitutional. *See Winn,* 562 F.3d at 1018-23. Specifically, the dissent contends the panel misapplied *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116, 103 S. Ct. 505, 74 L. Ed. 2d 297 (1982).

A careful reading of *Winn* shows that the dissent exaggerates the panel's reliance on *Larkin*.

*Larkin* does not control this case. *See Winn*, 562 F.3d at 1020 (emphasizing that "the delegation of scholarship funding to individual taxpayers, such as in Section 1089, does less to promote religion than the delegation of zoning authority to churches," such as provided under the statute at issue in *Larkin*). Rather, the panel observed that *Larkin*'s holding

> illustrates that when a statute delegates "a power ordinarily vested in agencies of government" to a private party, *see* [*Larkin*, 459 U.S.] at 122, without reasonable assurance that the party's choices will advance the secular purposes of the statute, any ensuing "perceived endorsement of a religious message" may be "reasonably attribut[ed]" to the government.

*Winn*, 562 F.3d at 1020-21 (second quotation from *Zelman*, 536 U.S. at 652).

Contrary to the dissent's suggestion, *Larkin*'s holding is not limited to cases where the state vests governmental powers in a "pervasively sectarian organization." Dissent 14735. In *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 114 S. Ct. 2481, 129 L. Ed. 2d 546 (1994), for example, the Court applied *Larkin* when considering an Establishment Clause challenge to a statute creating a school district coextensive with a religious community. This statute vested power in

individual taxpayers, not in a religious organization, but the Court nonetheless invalidated it. *See id.* at 698 ("The Establishment Clause problem [at issue] is more subtle [than that in *Larkin*], but it resembles the issue raised in *Larkin* to the extent that the earlier case teaches that a State may not delegate its civic authority to a group chosen according to a religious criterion."). Again, *Winn* does not suggest that the choices delegated to taxpayers under the Arizona Department of Revenue's construction of Section 1089 are the constitutional equivalent of the legislative action at issue in *Kiryas Joel*. That case makes clear, however, that the delegation concerns identified in *Larkin* are relevant to whether a reasonable, informed observer would conclude that the choices delegated under Section 1089 have the effect of promoting, or hindering, the program's secular purpose.[8]

The dissent further argues that in terms of constraining parents' access to secular educational options, taxpayers' choices under Section 1089 are no more constitutionally problematic than the choice of public schools not to participate in the Ohio voucher program in *Zelman*. Dissent 14736. This misses the

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[8] The dissent asserts that the "allocation of scholarship funds" is not a traditional governmental function. Dissent 14735 n.20. This framing of the question is unhelpfully narrow. Educational policy is certainly a traditional government function, and the state's decision to reimburse contributions to private scholarship funds is indisputably an educational policy decision.

point. Under the Ohio program, it was not the public schools' choices that ensured "the Establishment Clause was not implicated" – it was the *parents'* choices. *Zelman,* 536 U.S. at 652. Each parent had an equal choice under the Ohio program as to whether to apply a tuition voucher toward a private school, and the choice of one parent did not directly alter the array of options available to another parent. Accordingly, under the Ohio program, a parent's choice as to how best to educate her child had no coercive effect on another parent's choice whether to send her child to a secular or religious school. The Ohio program thus provided each eligible parent with a "genuine and *independent* private choice" whether to direct assistance to a religious school. *Id.* (emphasis added). The choices given to parents under the program therefore ensured "the circuit between government and religion was broken." *Id.* Although a public school's decision not to accept a voucher could indeed frustrate the secular purpose of the Ohio program, the Supreme Court did not *rely* on those choices to conclude the program was constitutional.

By contrast, the appellees in *Winn rely* on taxpayers' choices in arguing that the current construction of Section 1089 is valid under the Establishment Clause. The effect of these taxpayer choices, however, may be to *harm* the ability of aspiring scholarship recipients to obtain a scholarship available for use at a secular school. Accordingly, Section 1089 "delegat[es] to taxpayers a choice that, from the perspective of the program's aid recipients, 'deliberately

skew[s] incentives toward religious schools.'" *Winn*, 562 F.3d at 1013 (quoting *Zelman*, 536 U.S. at 650). Such choices are not, in themselves, sufficient to render an educational aid program valid under the Establishment Clause.

In summary, it was crucial to *Zelman*'s holding that the Ohio program afforded aid *recipients* a "genuine and independent private choice" whether to direct the assistance they received toward a religious school. *Zelman*, 536 U.S. at 652. Although the Arizona Department of Revenue's application of Section 1089 does not afford such choice, *Winn* carefully determined that the choice provided to *taxpayers* is insufficient to ensure "the circuit between government and religion was broken." *Id.* For reasons carefully laid out in the decision, our court was correct to decline en banc review.

## III. Secular Purpose

The dissent also faults *Winn* for concluding that Section 1089 may lack a valid secular purpose. *See* 562 F.3d at 1011-12. This criticism is premature. The question before the panel was "not whether Section 1089 in fact has a genuine, secular purpose, but whether plaintiffs could prove, on the facts alleged in the complaint, that it does not." *Id.* at 1012.

As the dissent states, a "legislature's stated reasons" for enacting a statute "will generally get deference," and must be accepted as true except in "unusual cases where the claim was an apparent

sham, or the secular purpose secondary." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 865, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005). The inquiry into whether a statute's ostensible purpose is a sham or secondary to a religious objective, however, must be "undertaken from the perspective of 'an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act.'" *Winn*, 562 F.3d at 1012 (quoting *McCreary*, 545 U.S. at 862). The dissent's position would foreclose such an inquiry.

The dissent surmises that in enacting Section 1089, "[t]he legislature could hardly have had the 'purpose' of endorsing religion when it set up a plan that, *for all it knew*, could have resulted in absolutely no funding for religious entities." Dissent 14739 (emphasis added). The dissent makes this claim without citing any evidence concerning what the legislature *actually* knew about how Section 1089 would likely operate. This is just as well, because no such evidence yet appears in the record. But the dissent suggests it should not *matter* to us whether the legislature knew that Section 1089 would result in disproportionate funding being made available only for use at religious institutions. The Supreme Court has cautioned us, however, against evaluating a program's purpose from the perspective of an "absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *McCreary*, 545 U.S.

at 866. In short, the dissent appears to call for either a heightened pleading standard for Establishment Clause claims – under which the plaintiff must allege specific facts establishing that the legislature acted for an invalid purpose – or an approach to evaluating a program's purpose that "would cut context out of the enquiry, to the point of ignoring history." *Id.* at 864.

Regarding evidence of Section 1089's implementation, the dissent contends that because taxpayer contributions to STOs are private conduct, they are irrelevant to whether Section 1089 has a valid secular purpose. Notably, in an as-applied context, at least two circuits have considered private conduct under a government program to be probative of the program's purpose,[9] and *Winn* does not foreclose the possibility

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[9] *See Staley v. Harris County, Tex.*, 461 F.3d 504, 513 (5th Cir. 2006); *Bonham v. D.C. Library Admin.*, 989 F.2d 1242, 1244-45, 300 U.S. App. D.C. 370 (D.C. Cir. 1993). In *Staley*, the Fifth Circuit considered the community response to a government-sponsored monument of a local citizen carrying a Bible in evaluating whether the monument had a valid secular purpose. *See* 461 F.3d at 513 ("[T]he fact that the monument, with the Bible, stood without complaint [from citizens] for thirty-two years, supports the notion that the original purpose was not objectively seen as predominantly religious."). In *Bonham*, Judge Mikva, reversing the district court's dismissal under Rule 12(b)(6) of a pro se plaintiff's claim that the closing of a public library on Easter Sunday violated the Establishment Clause, observed: "In determining the legislative purpose of a law or government practice, courts generally look to . . . testimony of *parties who participated in the enactment or implementation of the challenged law or practice*, historical context, and the

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that plaintiffs can point to private conduct probative of whether Section 1089 has a secular purpose. More probative, however, is the *government* conduct on the part of the State of Arizona in implementing Section 1089.

The Arizona Department of Revenue implements Section 1089 by allowing individuals to claim tax credits for contributions to private STOs. *See Winn*, 562 F.3d at 1009 ("The Supreme Court has recognized . . . that *state tax policies* such as tax deductions, tax exemptions and tax credits are *means of 'channeling . . . [state] assistance'* to private organizations. . . ." (emphasis added, ellipses in original) (quoting *Mueller*, 463 U.S. at 399)). According to plaintiffs' complaint, the Arizona Department of Revenue allows tax credits for contributions to STOs that provide scholarships only to religious schools. Individuals' contributions to STOs that discriminate on the basis of religion are not, of themselves, probative of Section 1089's purpose. The fact that the Arizona Department of Revenue gives tax credits for these contributions, however, could be probative of legislative expectations as to how state assistance under Section 1089 would be directed in practice.

Accordingly, by declining to rehear this case en banc, we appropriately rejected the suggestion that we should turn a blind eye to the history and

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sequence of events leading to the passage of the law or the initiation of the practice." 989 F.2d at 1244-45 (emphasis added).

implementation of Section 1089 simply because the statute is facially neutral.

## IV. Conclusion

This case required the panel to apply *Zelman* to an educational aid program that, according to the allegations of plaintiffs' complaint, lets taxpayers choose to make state-reimbursed contributions to private scholarship organizations, but allows the organizations to restrict access to state-funded scholarships on the basis of religion. *Winn* correctly held that such a program would not, under *Zelman*, provide parents with "genuine and independent private choice," and that the choice given to taxpayers under such a program could not be treated as the constitutional equivalent of the choice given to parents under the Ohio voucher program. Unlike the program in *Zelman*, the program alleged here neither makes scholarships available to parents on a religiously neutral basis nor gives them a true private choice as to where to utilize the scholarships. The panel correctly held that these allegations, if proven true, could establish an Establishment Clause violation. We therefore concur in the denial of rehearing en banc.

**DISSENT BY:** O'SCANNLAIN

**DISSENT**

O'SCANNLAIN, Circuit Judge, dissenting from the denial of rehearing en banc, joined by KOZINSKI, Chief Judge, KLEINFELD, GOULD, TALLMAN, BYBEE, BEA, and N.R. SMITH, Circuit Judges:

This case involves an Establishment Clause challenge to an Arizona educational tax credit program that provides scholarships to students wishing to attend private schools. This case is more notable, however, for what it does not involve: state action advancing religion. The government does not direct any aid to any religious school. Nor does the government encourage, promote, or otherwise incentivize private actors to direct aid to religious schools. Rather, "state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 655, 122 S. Ct. 2460, 153 L. Ed. 2d 604 (2002).

Unable to find any forbidden state action, the district court correctly dismissed the case on the pleadings. Sadly, our three-judge panel reversed. *See Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002 (9th Cir. 2009). Because a program of scrupulous "governmental neutrality between religion and religion, and between religion and nonreligion," *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968), cannot violate the Establishment

Clause, I respectfully dissent from our full court's regrettable denial of rehearing en banc.

I dissent not only because *Winn* cannot be squared with the Supreme Court's mandate in *Zelman*, but also because the panel's holding casts a pall over comparable educational tax-credit schemes in states across the nation and could derail legislative efforts in four states within our circuit to create similar programs.[1] In short, the panel's conclusion invalidates an increasingly popular method for providing school choice, jeopardizing the educational opportunities of hundreds of thousands of children nationwide.[2]

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Arizona law ("Section 1089") allows individuals voluntarily to contribute money to private, nonprofit corporations known as "student tuition organizations" ("STOs"). Ariz. Rev. Stat. Ann. § 43-1089(A). Anyone

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[1] *See* Fla. Stat. § 220.187; Ga. Code Ann. § 48-7-29.16; Ind. Code § 6-3.1-30.5; Iowa Code § 422.11S; 24 Pa. Stat. Ann. 20-2005-B; R.I. Gen. Laws § 44-62-2; A.B. 279, 2009-10 Leg., Reg. Sess., § 1 (Ca. 2009); S.B. 342, 61st Leg., Reg. Sess., § 1(3)(b)-(c) (Mont. 2009); S.B. 289, 75th Leg., Reg. Sess., § 6(1) (Nev. 2009); H.B. 2754, 75th Leg., Reg. Sess. (Or. 2009).

[2] Such programs have operated without incident, perhaps because no one has thought to challenge them *post-Zelman*. *Cf.*, *e.g.*, *Bush v. Holmes*, 919 So. 2d 392, 399 (Fla. 2006) (explaining that plaintiffs voluntarily dismissed a challenge to a Florida school choice program after *Zelman*).

can form an STO, and there are no constraints on a taxpayer's ability to donate to an STO of his choice. Should a taxpayer elect to direct funds to an STO, that contribution is refunded via tax credits of up to $500 for individual taxpayers and up to $1000 for married couples filing jointly.[3] *Id.*

STOs use these funds to provide scholarships and tuition grants to students attending schools within the state. *Id.* § 43-1089(G). While essentially any private school is statutorily eligible to receive scholarship monies,[4] STOs may choose which institutions they will support, so long as they provide funds to

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[3] The distinction the panel tries to draw between a tax credit and a deduction, *see* 562 F.3d at 1014-15, can have no constitutional significance. Both result in a reduction of the money paid by the taxpayer to the government, with the amount of the reduction going to the designated STO. The only practical difference is that with a deduction the taxpayer must make a co-payment of his own, whereas with a credit there is no co-payment. Of course, this favors richer taxpayers over poorer ones, as the former are more able to afford a personal contribution. Moreover, in a progressive tax system, deductions most favor the taxpayers with the greatest income. Not only does the value of the deduction increase with the taxpayer's marginal rate, but so does the amount of government revenue that is diverted at the taxpayer's behest. It is difficult to see why such a regressive regime (deductions) is constitutionally superior to the egalitarian tax credit. *Cf. Lochner v. New York*, 198 U.S. 45, 75, 25 S. Ct. 539, 49 L. Ed. 937 (1905) (Holmes, J., dissenting) (The Constitution "does not enact Mr. Herbert Spencer's social statics.").

[4] Schools that "discriminate on the basis of race, color, handicap, familial status or national origin" are ineligible. *Id.* § 43-1089(G)(2).

more than one school. *Id.*[5] Parents then decide which private school they would like their child to attend, and apply for scholarships from appropriate STOs.

In sum, the state's involvement stops with authorizing the creation of STOs and making tax credits available. After that, the government takes its hands off the wheel. Anyone can create an STO. Anyone can contribute to any STO and receive identical tax benefits. Anyone can apply for any scholarship offered by any STO.

Shortly after Section 1089's enactment, the Arizona Supreme Court held that the statute, on its face, did not violate the Establishment Clause. *See Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606 (Ariz. 1999). Taxpayer plaintiffs then brought this federal action, which was dismissed by the district court under the Tax Injunction Act. *See Winn v. Killian*, 307 F.3d 1011, 1013 (9th Cir. 2002). After the suit was reinstated, *see id.* at 1020; *see also Hibbs v. Winn*, 542 U.S. 88, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004) (affirming our opinion reversing its dismissal), the district court again dismissed the action, this

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[5] Like virtually every other tax credit system, *see supra* note 1, the Arizona statute requires STOs to provide scholarships "without limiting availability to only students of one school." Ariz. Rev. Stat. Ann. § 43-1089(G)(3). And again, like most other schemes, *see supra* note 1, the statute says STOs should allow children "to attend any qualified school of their parents' choice." *Id.* While hardly the model of clarity, this language has been interpreted to mean STOs satisfy the statue by providing scholarships to at least two schools.

time on federal constitutional grounds, *see Winn v. Hibbs*, 361 F. Supp. 2d 1117 (D. Ariz. 2005).

Plaintiffs appealed. They allege (and no one disputes) that in practice, some STOs make their scholarships available only to students willing to attend religiously affiliated schools. *Winn*, 562 F.3d at 1006. While the majority of STOs do not so limit their scholarships,[6] plaintiffs maintain that those that do receive the overwhelming majority of taxpayer contributions. *See id.* Consequently, they assert that the pool of available scholarship money is diminished for parents wishing to send their children to secular schools. *See id.* Plaintiffs contend that this disparity means Section 1089, as applied, impermissibly favors religion over nonreligion. *See id.*

The three-judge panel agreed and reversed the district court's dismissal, holding that "if plaintiffs' allegations are accepted as true, Section 1089 violates the Establishment Clause." *See id.* at 1013. Concluding that the nature of the tax credit made taxpayer contributions tantamount to government funds, the panel found that Section 1089 potentially violated both the purpose and effects prongs of *Lemon v. Kurtzman*, 403 U.S. 602, 603, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). *See id.* at 1011-23. The fact that taxpayers directed the majority of available funds to religious schools, the panel reasoned, deprived

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[6] Twenty-five of the fifty-five existing STOs limit scholarship awards to religious schools.

parents of a "genuinely independent and private choice[ ]" to send their children to secular private schools. *Id.* at 1013 (internal quotation marks and citation omitted). Accordingly, Section 1089 was not a "neutral program of private choice and a reasonable observer could . . . conclude that the aid reaching religious schools . . . carries with it the *imprimatur* of government endorsement." *Id.* at 1013-14 (internal quotation marks and citation omitted).[7]

II

I have no bone to pick with the manner in which the panel frames the basic constitutional inquiry. We all understand that the Establishment Clause "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman*, 536 U.S. at 648-49. More often than not, the Court determines whether these commands have been violated by asking whether a "reasonable observer," who is "aware of the history and context underlying a challenged program," would conclude

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[7] Make no mistake about the procedural posture of this decision. True, the case will be remanded to the district court. But the panel holds that, "if plaintiffs' allegations are accepted as true, Section 1089 violates the Establishment Clause." *Winn*, 562 F.3d at 1013. So far as I can tell, no one disputes plaintiffs' factual allegations about how the program operates in practice. Thus, the panel leaves the district court with no choice but to declare the program unconstitutional as applied, rendering the remand little more than an empty formality.

that the state has "endorsed" religion. *Id.* at 655 (internal quotation marks and citation omitted).

The panel's heavy emphasis on *Zelman* is also warranted. In that case, the Supreme Court upheld an Ohio school voucher program that provided tuition aid to Cleveland families on the basis of need. *Id.* at 644-45. The vouchers were distributed directly to parents, who could choose to use the scholarship money at any participating private, community, magnet, or public school. *Id.* at 645-46. The Court ruled that a "neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals" does not violate the Establishment Clause. *Id.* at 655.

It is in the application of these standards, however, that the three-judge panel lost the forest for the trees. In doing so, it reached a result that simply cannot be reconciled with *Zelman*.[8]

III

The panel is correct that a law may not have the "forbidden 'effect' of advancing . . . religion." *Id.* at 649. What the panel seems to neglect, however, is that "[f]or a law to have forbidden 'effects' under *Lemon,* it must be fair to say that the *government*

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[8] As the panel focused primarily on "effects," rather than "purpose," I address these two *Lemon* prongs out of order.

*itself* has advanced religion through its own activities and influence." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 337, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987).[9]

I must confess that I am at a loss to understand how a reasonable observer – one fully informed about all matters related to the program – could conclude that the "*government itself*" has endorsed religion in this case. Multiple layers of private, individual choice separate the state from any religious entanglement: the "*government itself*" is at least four times removed from any aid to religious organizations. First, an individual or group of individuals must choose to create an STO. Second, that STO must then decide to provide scholarships to religious schools. Third, taxpayers have to contribute to the STO in question. Finally, parents need to apply for a scholarship for their student. In every respect and at every level, these are purely private choices, not government policy. Under such circumstances, "government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." *Zelman,* 536

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[9] For example, the panel asserts that Arizona parents are presented with a choice that "deliberately skew[s] incentives toward religious schools." *See Winn,* 562 F.3d at 1013 (quoting *Zelman,* 536 U.S. at 650). The actual quotation from *Zelman,* however, includes a key qualifier: it condemns only programs where "the *State* deliberately skewed incentives toward religious schools." 536 U.S. at 650 (emphasis added). Since only state action can violate the Establishment Clause, the panel's omission is telling.

U.S. at 652-53 (internal quotation marks and citation omitted). Only after passing through choice piled upon choice do government funds reach religious organizations. That is not government endorsement: that is government nonchalance.[10]

To illustrate my point, consider the following hypothetical. Assume the exact statutory scheme embodied in Section 1089: anyone can create an STO, anyone can donate to an STO, and STOs can limit their scholarships to particular types of schools. Now imagine that only agnostics decide to create STOs. Imagine further that every STO refuses to provide tuition assistance to religious schools. In short, assume there is absolutely no money available for parents who want to send their children to a religious school. Would the parents be justified in accusing the *government* of depriving their children of school funds? Of course not.

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[10] The panel makes much of the fact that *Zelman* discussed aid flowing "directly" to parents. I submit that the Supreme Court used such terminology for two reasons. First, that was the case before the Court: it had no reason to pontificate on systems involving additional levels of private choice. Second, the language emphasized that the voucher program did not involve constitutionally problematic "direct" aid to religious institutions.

The panel turns this language into a rallying cry to suggest that by filtering aid through multiple levels of private choice – rather than a single level – the state endorses religion. But that makes no sense. How can *increasing* the separation between state and religion result in heightened government endorsement?

The foregoing example plainly shows that in this case, any "endorsement" of religion arising from the disbursement of state funds to religious entities turns wholly and completely on the independent, uncoerced choices of private individuals. The system Arizona created could just as easily have resulted in a total dearth of funding for religious organizations as opposed to the surfeit allegedly available. This feast or famine is utterly out of the state's hands. It simply cannot be, as the panel claims, that the "scholarship *program* . . . skews aid in favor of religious schools." *Winn*, 562 F.3d at 1013 (emphasis added). The "program" does no such thing: any "skew[ing]" that occurs takes place because of private, not government action. It is axiomatic that such action cannot violate the Establishment Clause.

A

The panel however, believes that under this multi-tiered system, choice is the culprit, not the savior. After all, plaintiffs allege that it is "the choice delegated to taxpayers" which "channels a disproportionate amount of government aid to sectarian STOs [that] limit their scholarships to use at religious schools." *Id. Zelman*, the panel maintains, focused on parental choice. *Id.* at 1018. Here, however, that choice is purported impermissibly to be "constrained" by the decisions of taxpayers and STOs. *Id.* at 1016. In other words, the choices of others deprive parents of their own "independent and private choice[ ]." *Id.* at 1013 (internal quotation marks and citation

omitted). They might want to send their children to secular private schools, but scholarships are not readily available for that purpose. Moreover, the panel claims the alleged abundance of funds from religious STOs creates an incentive for these parents to enroll their children in religious schools. *Id.* at 1017-18. The panel therefore holds that Section 1089 "fails to provide genuine opportunities for . . . parents to select secular educational options for their school-age children." *Id.* at 1018 (internal quotation marks and citation omitted).

I admit that the panel's conclusion with respect to the purported lack of parental choice finds support in *Zelman*. The problem is, that support comes from Justice Souter's dissent, not the opinion of the Court. Several aspects of the majority's reasoning in that case make the *Winn* panel's conclusion infirm.

1

By focusing generally on the scope of parental choice, the *Winn* panel, like the *Zelman* dissent, is barking up the wrong tree. The question is not whether a parent's choice is somehow limited or constrained, the question is whether the *government* has somehow limited or constrained the choice.

In *Zelman*, Justice Souter accused the majority of allowing external factors to "influenc[e] choices in a way that aims the money in a religious direction." 536 U.S. at 703 (Souter, J., dissenting). Of the fifty-six private schools that participated in the Cleveland

voucher program, he noted, forty-six were religious. *Id.* In his mind, this lack of a "wide array of private nonreligious options" suggested that any "choice" was not genuine. *See id.* at 703-06. Rather, he believed parents' decisionmaking process was skewed by "the fact that too few nonreligious school desks are available and few but religious schools can afford to accept more than a handful of voucher students." *Id.* at 707. "For the overwhelming number of children in the voucher scheme," he concluded, "the only alternative to the public schools is religious." *Id.* He was not swayed by the fact that these constraints were unrelated to state action: "a Hobson's choice is not a choice, whatever the reason for being Hobsonian." *Id.* In sum, Justice Souter would have struck down the Ohio voucher program because parents' choice was influenced by factors beyond their control.

Obviously, Justice Souter's position did not carry the day. "That 46 of the 56 private schools now participating in the program are religious schools," the majority explained, "does not condemn it as a violation of the Establishment Clause." *Id.* at 655 (majority opinion). For one thing, the Court noted that the imbalance was not a function of government action. *See id.* at 656-57. Moreover, "[t]o attribute constitutional significance" to the availability of secular options, "would lead to the absurd result that a neutral school-choice program might be permissible in . . . some states [with a high concentration of

secular schools], but not in other States [where religious schools are plentiful]." *Id.* at 657.[11] To avoid this absurdity, the majority held that "[t]he constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time,[12] most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school." *Id.* at 658.[13]

I see no meaningful distinction between the situation in *Zelman* and the facts of this case. Both cases involve alleged "constraints" on access to a scarce

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[11] Earlier, I listed several state programs jeopardized by the panel's holding. *See supra* note 1. Under the panel's reasoning, those schemes could be constitutional if taxpayers decided to provide more funds to secular, rather than religious STOs. An identical program might then be constitutional in one state and unconstitutional in another.

[12] The "at a particular time" reference is especially significant. As discussed above, nothing in Section 1089 precludes any Arizona taxpayer, tomorrow, from suddenly deciding to fund exclusively secular STOs. *See supra* pp. 14709-11. The Supreme Court has twice declined to strike down laws on the basis of such moving targets. *See Zelman*, 536 U.S. at 657-58; *Mueller v. Allen*, 463 U.S. 388, 401, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983).

[13] The Court went on to explain that it is "irrelevant . . . to the constitutionality" of a government aid program that "a vast majority of program benefits went to religious schools." *Zelman*, 536 U.S. at 658. The panel distinguishes this point, claiming that the *Zelman* did not involve a situation where parental choice was "constrained." *Winn*, 562 F.3d at 1017 n.14. As demonstrated below, that is simply not the case. *See infra* pp. 14728-31.

secular resource – "nonreligious [private] school desks." In *Zelman*, only ten of the participating schools were secular. *Id.* at 656. Parents were thus "constrained" by third-party decisions to fund religious, rather than secular schools. Here, while thirty out of fifty-five STOs offer scholarships to secular schools, the majority of program funds are allegedly concentrated in religious STOs. Parents are thus "constrained" by the decisions of some STOs to limit their scholarships to religious institutions, and taxpayer choices to direct their funds to those STOs. The key point is that in neither *Zelman* nor the case at hand are the purported "constraints" government-induced. There is simply no constitutionally significant distinction between a system where – for reasons unattributable to state action – money is available, but there are a limited number of schools to receive it, and a system where schools may be available, but there is a limited amount of money to spend. Under either scenario, as Justice Souter bemoaned, "[f]or the overwhelming number of children in the [program], the only alternative to the public schools is religious." *Id.* at 707 (Souter, J., dissenting).

I can go on. In *Zelman*, voucher funds could be used at participating public schools in districts adjacent to Cleveland. *Id.* at 645 (majority opinion). However, no such school "elected to participate." *Id.* at 647. Parental choice was therefore "constrained" by the decisions of out-of-district public school administrators. Similarly, Ohio did not require private secular schools to accept vouchers: they chose to do

so. *See id.* at 656 n.4. Citing overcrowding or a desire for independence from government funds, these schools could just as easily have decided to opt out of the program. Alternatively, they could have, for whatever reason, decided to close up shop. In either scenario, parents again would be left with a reduced "choice" to send their children to private, secular schools. Did the *Zelman* Court strike down the Ohio program for impermissibly "delegating" such decisions to school administrators? Was parental choice held to be unduly "constrained"? Of course not. Instead, the Court said that the availability of a private secular education, "in a particular area, at a particular time," was irrelevant to the constitutional inquiry. *See Zelman*, 536 U.S. at 656-60; *supra* pp. 14728.[14]

Ultimately, the panel seems to assume that parents must have the same access to "nonreligious [private] school desks" as they do to religious private

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[14] The *Zelman* Court's comment that the "preponderance of religiously affiliated private schools certainly did not arise as a result of the [voucher] program" is also instructive. 536 U.S. at 656-57. The Court stated that the imbalance was "a phenomenon common to many American cities." *Id.* at 657. In other words, the disparity was caused not by government action, but rather by private predilections. The same can be said about the existence of religiously affiliated STOs and the disproportionate share of taxpayer contributions they receive. The concentration of funds in religious entities – and the resulting "constraint" on parental choice – "certainly did not arise as a result of" any state action, but rather as a consequence of private decisions. *See supra* pp. 14724-26.

school desks. But that was certainly not the case in *Zelman*, and the Ohio voucher program was upheld. Indeed, such result is unattainable in *any* program where the government is neutral with respect to religion and nonreligion. If the government takes the constitutionally required hands-off approach, external factors will define the playing field. Contrary to the panel's conclusion, the constitutional inquiry "simply does not turn" on whatever influence these factors might exert on parents. *Zelman*, 536 U.S. at 658. Again, provided there is "no evidence that the *State* deliberately skewed incentives toward religious schools," there is no Establishment Clause violation. *Id.* at 650 (emphasis added); *see supra* pp. 14723-26. As the Arizona tax credit program is just as much a program of "true private choice" as the program in *Zelman*, 536 U.S. at 649, the panel erred in reinstating the constitutional challenge.[15]

2

In rejecting Justice Souter's position, the *Zelman* majority also emphasized that he was asking the wrong question. Rather than focusing narrowly on the challenged voucher program, the majority explained that the "Establishment Clause question is whether Ohio is coercing parents into sending their

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[15] For this reason, the *Winn* panel's reliance on *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S. Ct. 2993, 37 L. Ed. 2d 948 (1973), is misplaced. *See Zelman*, 536 U.S. at 661-62.

children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a [voucher]." *Id.* at 655-56. Because the *Winn* panel adopts Justice Souter's overly restrictive approach, rather than assessing "*all* options" available to Arizona students, its result is similarly flawed.[16]

Indeed, the panel overtly limited its parental-choice inquiry to "the range of educational choices the STO-administered scholarship programs offer." *Winn*, 562 F.3d at 1018. It "reject[ed] the suggestion that the mere existence of the public school system guarantees that any scholarship program provides for genuine private choice." *Id.* While the latter statement may be true, it is also something of a non sequitur. No one claims the existence of a public school system grants a state license to ignore the Establishment Clause. The question, as *Zelman* instructs, is whether Arizona is "coercing parents into sending their children to religious schools," a question which must be answered by evaluating "*all* options" Arizona provides its schoolchildren. 536 U.S. at 655-56.

The panel did not even engage in this inquiry. Had it done so, it would have discovered that Section

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[16] Interestingly, the Supreme Court decided to italicize "*all* options" in *Zelman*, and "*government itself*" in *Amos*. Maybe the justices thought these requirements were important. *Zelman*, 536 U.S. at 655-56; *Amos*, 483 U.S. at 337.

1089 is but one of a "range of educational choices" available to parents of school-aged children. *Id.* at 655; *see also Kotterman*, 972 P.2d at 611 (noting that the "Arizona Legislature has, in recent years, expanded the options available in public education" and listing some of those options). Arizona's public schools must provide for open enrollment, allowing parents to send their children, tuition-free, to schools of their choice. Ariz. Rev. Stat. Ann. § 15-816.01(A). Tax credits are available for donations to public schools for "extracurricular activities or character education." Ariz. Rev. Stat. Ann. § 43-1089.01. An extensive system of charter schools "provide[s] additional academic choices for parents and pupils." *Id.* § 15-181.[17] Homeschooling is permitted and protected. *Id.* §§ 15-745, 802-03. Indeed, Section 1089 itself offers parents yet another alternative: they can create their own STO and solicit donations for use at secular private schools. These alternative educational opportunities mirror those the Court took into consideration in *Zelman*. *See* 536 U.S. at 655 ("Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school,

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[17] Out of the 4,000 plus charters schools across the country, 478 are in Arizona. *See* Arizona Charter Schools Association, http://www.azcharters.org/pages/schools-basic-statistics (last visited July 25, 2009).

enroll in a community school, or enroll in a magnet school.").[18]

This is no Hobson's choice. Far from "coercing" parents into sending their children to religious schools, Arizona provides a wide variety of secular alternatives. "Any objective observer familiar with the full history and context of [Section 1089] would reasonably view it as one aspect of a broader undertaking. . . ." *Id.* at 655. By shutting its eyes to the host of options available to Arizona parents, the panel's opinion directly conflicts with *Zelman*.[19]

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[18] As the district court observed, parents are actually *discouraged* from sending their children to private religious schools. "An Arizona student may attend any public school without cost. . . . In contrast, the average scholarship paid by STOs in 2003 was $1,222, a sum unlikely to cover all of the costs of private school attendance." *Winn*, 361 F. Supp. 2d at 1121 (citations and footnote omitted); *see also Zelman*, 536 U.S. at 654 ("Families . . . have a financial disincentive to choose a private religious school over other schools. Parents that choose to . . . enroll their children in a private school . . . must copay a portion of the school's tuition. Families that choose a community school, magnet school, or traditional public school pay nothing. [This] clearly dispel[s] the claim that the program creates financial incentives for parents to choose a sectarian school." (internal quotation marks, alterations, and citation omitted)).

[19] The concurrence argues that this reading of *Zelman* is inconsistent with *Nyquist*. Concurrence at 14712-13. The Court invalidated the New York tax program at issue in *Nyquist* because its tuition reimbursements were designed "'explicitly to offer . . . an incentive to parents to send their children to sectarian schools.'" *Zelman*, 536 U.S. at 662 (quoting *Nyquist*, 413 U.S. at 782-83). As I have explained above, the plethora of choices available to Arizona parents demonstrates that Section

(Continued on following page)

B

As demonstrated by the foregoing arguments, the Arizona program provides parents with "true private choice." That established, the panel's discussion of taxpayer choice becomes surplusage. Indeed, is its curious focus on "taxpayer choice" an apt analogy at all? I suggest that *Winn*'s reliance on *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 103 S. Ct. 505, 74 L. Ed. 2d 297 (1982), is utterly mistaken.

The thrust of the panel's reasoning is that taxpayer choice is not a valid substitute for the *parental* choice allegedly at the core of *Zelman*. I am not certain, however, that parental choice was as central to the reasoning of *Zelman* as the panel would have it. While that opinion does repeatedly refer to aid "recipients," *see Winn*, 562 F.3d at 1018 (listing citations), at other times, it refers only to private, nongovernmental choice, *see, e.g., Zelman*, 536 U.S. at 649 (describing programs where "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals"); *id.* at 655 (stating that "no reasonable observer" would find government endorsement where "state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals"). Significantly, *Zelman* seems most concerned about preventing the state from reaching out to "grant

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1089 has no effect of incentivizing religious schools over sectarian schools.

special favors that might lead to a religious establishment." *Id.* at 652-53 (internal quotation marks and citation omitted). So long as "favors" are doled out independent of state action, the Establishment Clause – which again, prohibits the "*government itself*" from endorsing religion – is not offended.

I further submit that under the endorsement test, any level of attenuation between government action and aid to religion necessarily reduces the likelihood that a "reasonable observer" will find impermissible government approbation. There can be no doubt that taxpayer choice contributes to that attenuation. Thus, the panel's analysis of whether the choice Section 1089 provides to taxpayers ensures that "'the circuit between government and religion was broken'" is beside the point. *Winn,* 562 F.3d at 1021 (quoting *Zelman,* 536 U.S. at 652). The self-evident fact is that by "delegating" the choice to taxpayers, the government already broke the circuit.

Nonetheless, the panel contends a reasonable observer would consider two factors when deciding whether a program of individual choice violates the Establishment Clause: the "role the person making the choice occupies in the structure of the program," *id.* at 1020, and "whether the choice delegated . . . has the effect of promoting, or hindering, the program's secular purpose," *id.* at 1021. Regarding the former, the panel determined there was "no 'effective means of guaranteeing'" that taxpayers would exercise their choice "'exclusively for secular, neutral, and nonideological purposes.'" *Id.* at 1020 (quoting *Larkin,* 459

U.S. at 125). Parents, on the other hand, have "incentives to apply the program's aid based on their children's educational interests instead of on sectarian considerations." *Id.* at 1021. As for the latter, the panel concluded that taxpayers thwarted the secular purpose of the statute insofar as their contributions narrowed the range of available educational alternatives. *Id.* at 1022.

One could see how a reasonable observer in *Larkin* could perceive government endorsement of religion from the "role the [entity] making the choice" played in the scheme. Maybe I am stating the obvious, but a large part of that perception might rest on the fact that in *Larkin,* the state delegated legislative authority – the ability to veto liquor licenses – to *churches*. *See* 459 U.S. at 125. I say again: churches. Under such circumstances it is completely unsurprising that a reasonable observer would conclude that this "joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some." *Id.* at 125-26. To what pervasively sectarian organization has Arizona "delegated" the choice at issue in this case? The Arizona taxpayer.[20] When perceived endorsement

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[20] Additionally, the authority delegated in *Larkin* was absolute veto power in an area of traditional government functioning. 459 U.S. at 125. Here, each individual taxpayer exercises only a modicum of control over the allocation of scholarship funds.

of religion is at issue, state cooperation with churches is a far cry from state cooperation with taxpayers.[21]

Moreover, I disagree with the panel's conclusion that parents are somehow less motivated to promote religious objectives than taxpayers generally. As anyone who has grown up in a religious household will tell you, schooling decisions are as frequently made on the basis of *religious* considerations as they are on purely secular academic grounds. At the very least, sectarian considerations factor into the equation of what is in the child's best interests educationally. Thus, whether it resides with the taxpayer or the parent, once the choice is made available, the state has no "effective means of guaranteeing" that it will be exercised "exclusively for secular, neutral, and nonideological purposes." *Id.* at 125 (internal quotation marks and citation omitted). By contrast with engaging in pseudo-psychological inquires into motivation, under *Zelman,* we need only satisfy ourselves that the choice, whatever it is, is made by a private actor, not by the government.

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[21] *Board of Education of Kiryas Joel Village School District v. Grumet,* 512 U.S. 687, 114 S. Ct. 2481, 129 L. Ed. 2d 546 (1994), does not support the panel's analysis. In *Larkin,* legislative authority was delegated to churches. In *Kiryas Joel,* the state created a school district such that a particular religious group would have "exclusive control of the political subdivision." 512 U.S. at 698-99. Both actions displayed overt religious bias. "Delegation" to the Arizona taxpayer does not.

With respect to taxpayers' ability to "thwart" the secular purpose of the statute, as discussed above, actors in *any* program of true private choice will have this ability. *See supra* pp. 14728-30. In *Zelman,* for example, the purpose of providing a broad range of educational opportunities was "thwarted" by the decisions of neighboring public-school administrators to decline program vouchers. *See supra* pp. 14729-30. The goal could be similarly "thwarted" if secular private school administrators decided to pull out of the program. *See supra* pp. 14729-30. An inherent reality of true private choice programs cannot condemn Section 1089.

Ultimately, the panel appears to argue that Arizona's scheme is flawed because it essentially delegates to a private entity something the state could not constitutionally achieve by the exercise of its own powers; here, the promotion of religious education. *See Winn,* 562 F.3d at 1020; *see also id.* at 1021 (citing *Norwood v. Harrison,* 413 U.S. 455, 465, 93 S. Ct. 2804, 37 L. Ed. 2d 723 (1973)). That may well be true, but as the panel's own citation indicates, for that to be the case, the state must somehow "*induce, encourage* or *promote* private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood,* 413 U.S. at 465 (emphases added). At the risk of beating a dead horse, I repeat that the state here has done *nothing* to cajole parents, STOs, or taxpayers into supporting religious education. The state has simply said, if you donate to the STO of your choice, you get a tax credit. Such action

in no way induces, encourages, or promotes private parties to aid religion.[22]

IV

The panel also holds that plaintiffs have alleged facts suggesting Section 1089 was not "enacted for . . . [a] valid secular purpose." *Winn*, 562 F.3d at 1011 (internal quotation marks and citation omitted). The panel reaches this conclusion despite conceding that the statute is facially neutral with respect to religion. *See id.* at 1011-12. Nothing in the legislative history suggests that the driving force behind the bill was anything other than the desire to provide "equal access to a wide range of schooling options for students of every income level." *Id.*; *see also Mueller*, 463 U.S. at 395 ("A state's decision to defray the cost of educational expenses incurred by parents – regardless of the type of schools their children attend – evidences a purpose that is both secular and understandable."). Nonetheless, the panel maintains that plaintiffs could prove, based on how Section 1089 operates in practice, that this "secular and valid" purpose is a sham. *Winn*, 562 F.3d at 1011-12.

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[22] The concurrence asserts that "[t]he effect of these taxpayer choices . . . may be to *harm* the ability of aspiring scholarship recipients to obtain a scholarship available for use at a secular school." Concurrence at 14716. I fail to see how Section 1089 – which permits tax deductions for gifts to both religious and secular scholarship funds – harms a student's ability to obtain a scholarship to a secular school.

From its citation to *McCreary County v. ACLU*, 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005), the panel seems to argue that the very enactment of Section 1089 "bespoke" a religious purpose. *Winn*, 562 F.3d at 1012. But how can this be so? *McCreary* does say that government action can be so "patently religious" that its nonsecular nature is evident. 545 U.S. at 862. The examples provided, however, are situations where the state mandated Bible study, the teaching of creationism, and prayer in schools. *Id.* at 862-63. Setting up a tax credit program to provide scholarships to children generally is hardly of the same ilk.

To the extent the panel claims that the manner in which Section 1089 has been *implemented* reveals the stated secular purpose to be a sham, their arguments are similarly unpersuasive. First, the Supreme Court has recognized that a "legislature's stated reasons will generally get deference," deference only abandoned in "those unusual cases where the claim was an apparent sham." *Id.* at 864-65. Nothing in the plaintiffs allegations suggest this is one of those "unusual cases," and as setting up a tax credit program is not a "patently religious" act, there is nothing "apparent" about any purported sham. Second, the implementation inquiry centers on actions taken by the *government*. *See id.* at 862 (stating that the inquiry turns on the "traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act") (internal quotation marks and citations omitted); *id.*

at 870-74 (questioning the government's newly proffered purposes after it altered a Ten Commandments display in an attempt to mitigate previously stated sectarian purposes). Here, the alleged impropriety arises from taxpayer, not government action. Third, the panel's holding turns on plaintiff's allegation that "in practice STOs are permitted to restrict the use of their scholarships to use at certain religious schools." *Winn,* 562 F.3d at 1012. But that result is apparent from the statute itself, which is satisfied so long as STOs provide scholarships to two or more schools, *see supra* note 5, a fact plaintiffs themselves recognize in their complaint. That an STO may independently decide to limit its scholarships does not make a religious purpose "apparent."[23]

Ultimately, the crux of the panel's purpose holding turns on matters previously discussed under the effects prong: a nonsecular purpose could be inferred from the fact that, at a given moment, the bulk of scholarship money is available only for use at religious schools. But as detailed above, money flows to religious institutions entirely at the whim of nongovernmental actors: taxpayers or STOs. The legislature could hardly have had the "purpose" of endorsing religion when it set up a plan that, for all it

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[23] Additionally, any inquiry into purpose must look at context. *See McCreary,* 545 U.S. at 862, 864, 866. As discussed above, Section 1089 was enacted amidst a broader effort to increase alternative educational opportunities. *See supra* pp. 14730-33; *see also Kotterman,* 972 P.2d at 611.

knew, could have resulted in absolutely no funding for religious entities. *See supra* pp. 14723-26. This moving target is irrelevant to the Establishment Clause inquiry. *See supra* pp. 14727-31.

V

The layer upon layer of private choice built into this program ensures that "the circuit between government and religion [is] broken." *Zelman*, 536 U.S. at 652. Try as it may, the panel cannot complete such circuit. Ultimately, nothing in the panel opinion grapples with the fact that Arizona does nothing to encourage, to promote, or otherwise to incentivize private actors to direct aid to religious schools. Nothing explains how "the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337. Nothing points to any "evidence that the *State* deliberately skewed incentives toward religious schools." *Zelman*, 536 U.S. at 650 (emphasis added). Nothing shows how Section 1089 enables Arizona to "grant special favors that might lead to a religious establishment." *Id.* at 652-53 (internal quotation marks and citation omitted).

But the three-judge panel can hardly be faulted for these omissions: it cannot manufacture what does not exist.[24] What does exist is a tax credit system that

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[24] *Cf. Compassion in Dying v. Washington*, 85 F.3d 1440, 1446-47 (9th Cir. 1996) (Trott, J., dissenting from denial of

(Continued on following page)

relies entirely on private choice. Individuals choose to create an STO. STOs choose to limit their funds to certain schools. Taxpayers choose to donate. Parents choose to apply for scholarships. In truth, *everyone* in Arizona has a choice – everyone except the government. No *reasonable* observer would think this lengthy chain of choice suggests the government has endorsed religion.

Because the three-judge panel's decision strays from established Supreme Court precedent, and because it jeopardizes the educational opportunities of thousands of children who enjoy the benefits of Section 1089 and related programs across the nation, I must respectfully dissent from our court's regrettable failure to rehear this case en banc.

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rehearing en banc) ("No magician – not David Copperfield, not even Harry Houdini – can produce a rabbit from a hat unless the rabbit is in the hat to begin with. Moreover, if a hat does not contain such an animal, a magician cannot claim that anything he is able to produce from it is in fact a rabbit, no matter how sincere he may be or how great his forensic skills. All of this has something to do with basic physics.")

First Amendment to the U.S. Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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A.R.S. § 43-1089 (2009)

§ 43-1089. Credit for contributions to school tuition organization; definitions

A. A credit is allowed against the taxes imposed by this title for the amount of voluntary cash contributions by the taxpayer or on the taxpayer's behalf pursuant to section 43-401, subsection H during the taxable year to a school tuition organization, but not exceeding:

1. Five hundred dollars in any taxable year for a single individual or a head of household.

2. Eight hundred twenty-five dollars in taxable year 2005 for a married couple filing a joint return.

3. One thousand dollars in taxable year 2006 and any subsequent taxable year for a married couple filing a joint return.

B. A husband and wife who file separate returns for a taxable year in which they could have filed a joint return may each claim only one-half of

the tax credit that would have been allowed for a joint return.

C. If the allowable tax credit exceeds the taxes otherwise due under this title on the claimant's income, or if there are no taxes due under this title, the taxpayer may carry the amount of the claim not used to offset the taxes under this title forward for not more than five consecutive taxable years' income tax liability.

D. The credit allowed by this section is in lieu of any deduction pursuant to section 170 of the internal revenue code and taken for state tax purposes.

E. The tax credit is not allowed if the taxpayer designates the taxpayer's contribution to the school tuition organization for the direct benefit of any dependent of the taxpayer.

F. A school tuition organization that receives a voluntary cash contribution pursuant to subsection A shall report electronically to the department, in a form prescribed by the department, by February 28 of each year the following information:

1. The name, address and contact name of the school tuition organization.

2. The total number of contributions received during the previous calendar year.

3. The total dollar amount of contributions received during the previous calendar year.

4. The total number of children awarded educational scholarships or tuition grants during the previous calendar year.

5. The total dollar amount of educational scholarships and tuition grants awarded during the previous calendar year.

6. For each school to which educational scholarships or tuition grants were awarded:

(a) The name and address of the school.

(b) The number of educational scholarships and tuition grants awarded during the previous calendar year.

(c) The total dollar amount of educational scholarships and tuition grants awarded during the previous calendar year.

G. For the purposes of this section:

1. "Handicapped student" means a student who has any of the following conditions:

(a) Hearing impairment.

(b) Visual impairment.

(c) Developmental delay.

(d) Preschool severe delay.

(e) Speech/language impairment.

2. "Qualified school" means a nongovernmental primary school or secondary school or a preschool for handicapped students that is located in this state, that does not discriminate on the basis of race, color, handicap, familial status or national

origin and that satisfies the requirements prescribed by law for private schools in this state on January 1, 1997.

3. "School tuition organization" means a charitable organization in this state that is exempt from federal taxation under section 501(c)(3) of the internal revenue code and that allocates at least ninety per cent of its annual revenue for educational scholarships or tuition grants to children to allow them to attend any qualified school of their parents' choice. In addition, to qualify as a school tuition organization the charitable organization shall provide educational scholarships or tuition grants to students without limiting availability to only students of one school.

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**UNITED STATES DISTRICT COURT**
**DISTRICT OF ARIZONA**

KATHLEEN M. WINN, an Arizona taxpayer; DIANE and MAURICE WOLFTHAL, Arizona taxpayers; and LYNN HOFFMAN, an Arizona taxpayer,

Plaintiffs,

v.

MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue,

Defendant.

No. CIV '00 02 87 PHX EHC

**COMPLAINT**

(Filed Feb. 15, 2000)

THIS DOCUMENT IS *NOT* IN PROPER FORM ACCORDING TO FEDERAL AND/OR LOCAL RULES AND PRACTICES AND IS SUBJECT TO REJECTION BY THE COURT

REFERENCE: 19(A)(3)
(Rule Number/Section)

Plaintiffs, by and through their counsel undersigned, hereby make the following complaint against Defendant:

**Parties**

1. Plaintiffs, Kathleen M. Winn, Diane and Maurice Wolfthal, and Lynn Hoffman are citizens and residents of Arizona, who pay Arizona income taxes on income earned in Arizona.

2. Defendant Mark W. Killian is Director of the Arizona Department of Revenue. Defendant Killian is responsible under state law for the administration of Arizona's income tax laws, including A.R.S. § 43-1089, the constitutionality of which is challenged in this action.

**Jurisdiction**

3. Plaintiffs allege that A.R.S. § 43-1089, on its face and as administered by Defendant Killian, deprives them of rights guaranteed by the First and Fourteenth Amendments to the United States Constitution. Plaintiffs seek relief pursuant to the United States Constitution and 42 U.S.C. § 1983. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a), and venue pursuant to 28 U.S.C. § 1391(b).

**Factual Allegations**

4. Plaintiffs challenge the constitutionality, on its face and as applied, of A.R.S. § 43-1089, enacted

in 1997. A copy of A.R.S. § 43-1089 is attached to this complaint as Exhibit A.

5. A.R.S. § 43-1089 provides for a "tuition tax credit," such that any taxpayer who pays Arizona income taxes may satisfy up to $500 of his, her, or its annual state income tax obligation by paying that amount to a "school tuition organization" ("STO") instead of to the State.

6. Pursuant to A.R.S. § 43-1089, an STO must, in turn, use at least 90% of the payments it receives from taxpayers for tuition grants to children to attend private primary or secondary schools in Arizona.

7. Taxpayers who make payments to any STO in a given tax year receive a 100%, dollar-for-dollar credit on the state income taxes that are due from them for that year, i.e., they may reduce the income tax paid to the State for that year by the entire amount, up to $500 per year, paid to an STO.

8. Taxpayers are not required to have children in school or to have incurred any educational expenses (or any other expenses) in order to claim the 100% tax credit for payments made to STOs.

9. The amounts paid to STOs by taxpayers and claimed by taxpayers as credits toward payment of Arizona income taxes are not contributions of taxpayer funds to the STOs, because taxpayers incur no cost in making such payments. The amounts are, instead, contributions of state funds to the STOs, because the amounts paid to

STOs reduce state income tax revenues on a dollar-for-dollar basis.

10. A.R.S. § 43-1089 places no limit on the total amount of State funds that may be diverted to STOs each year. If one million Arizona taxpayers utilized the STO credit each year, the amount of State income tax revenues annually diverted to STOs would be $500 million.

11. STOs must make tuition grants of State funds available to students at more than one non-public school. As long as they do so, STOs may (and most do) restrict their grants to students attending religious schools. An STO may, for example, make tuition grants of State funds available only to children attending Catholic schools, only to children attending Lutheran schools, only to children attending Christian Schools or only to children attending Jewish schools. STOs may also restrict their grants of State funds only to children of a specific religious denomination, for example, Catholic children, Lutheran children, Christian children or Jewish children.

12. STOs that restrict their grants to students attending religious schools use state funds solely for the purpose of enabling children to attend religious schools at State expense.

13. A.R.S. § 43-1089 thus authorizes the formation of agencies that have as their sole purpose the distribution of State funds to children of a particular religious denomination or to children attending schools of a particular religious denomination.

14. The money used by STOs for grants to students attending religious schools would otherwise have been paid into the state general fund by the taxpayers making those donations. The diversion of those funds to such STOs therefore reduces the balance of the state general fund on a dollar-for-dollar basis.

15. As of the end of August, 1999, 15 STOs had reported data to the Arizona Department of Revenue regarding funds received and/or tuition grants awarded during calendar year 1998. Of the total of $1,815,799 received from taxpayers by all STOs in 1998, at least $1,708,769, or 94%, went to STOs restricting tuition grants of state funds to students attending religious schools.

16. The largest STO recipient of income tax revenues during the 1998 calendar year was The Catholic Tuition Organization of the Diocese of Phoenix, which received $837,140. The Catholic Tuition Organization restricts its grants to students attending Catholic schools in the Diocese of Phoenix. Eligible schools include, for example, Saint Mary's High School. The advertised mission of Saint Mary's is "to provide a quality Catholic education by developing and sustaining a rich tradition grounded in Gospel and family values . . . " Another eligible school is St. Louis the King School, which advertises that "Gospel values and self-discipline skills are infused into the total curriculum." Another eligible school, St. John Vianney School, advertises that Christ "is the unseen but ever present teacher in its classes."

17. The second largest STO recipient of income tax revenues was Arizona Christian School Tuition Organization, which received $538,611. The Arizona Christian School Tuition Organization restricts its grants to students attending "evangelical" Christian schools in Arizona.

18. The third largest STO recipient of income tax revenues was Brophy Community Foundation, which restricted grants to children attending two Catholic schools (Brophy College Preparatory for boys and Xavier College Preparatory for girls) and which received $163,603. The advertised philosophy of Xavier College Preparatory includes such goals as "instill[ing] a knowledge of the truths of faith, enlightened by the post-Conciliar teachings of the Church." Brophy College Preparatory's advertised mission includes the goal of offering students "an intimate relationship with God" through "the process of nurturing the soul."

19. The three religious STOs described above, which controlled 85% of the total STO donations during 1998, made no scholarship grants at all during that year. Despite the unavailability of that significant pool of funds, 75% of the scholarship funds granted by STOs in 1998 were granted to students attending religious schools, and 79% of the schools receiving scholarships were religious schools.

20. During 1998, the STO making the largest amount of tuition grants was Christian Scholarship of Arizona; the STO making the second largest amount of grants was Northern Arizona

Christian School Scholarship; the STO making the third largest amount of grants was Higher Education Lutherans Program.

21. The school receiving the largest amount of STO funded tuition payments during 1998 was the Casas Adobes Baptist School in Tucson; the school receiving the second largest amount was the Palo Verde Christian School in Tucson; the schools receiving the third and fourth largest amounts were the Son Rise Christian School and the Sedona Christian School. Each of these schools is pervasively sectarian.

22. Upon information and belief STOs received and granted a much larger amount of income tax revenue for calendar year 1999, due in part to the absence of any constitutional attack on the program for most of the year and to the public's greater familiarity with the program. Upon information and belief, the Catholic Diocese of Phoenix collected more than $4.5 million for its STO during 1999. The Catholic Diocese of Tucson recently announced that it had collected more than $850,000 for its STO during the same time period, and the Brophy Community Foundation announced that its 1999 donations exceeded $640,000.

23. Except for a statutory prohibition on making grants to children attending schools that discriminate on the basis of race, color, handicap, familial status or national origin, STOs may utilize any standards they wish for making tuition grants of State funds to students attending non-public schools; including preferences for

students of a particular religious denomination. STOs need not make grants on the basis of financial need or academic performance. STOs may also make grants to students attending schools that discriminate on the basis of religion and/or sex in accepting students.

24. Religious schools that receive tuition payments made with STO-granted State funds may and do use those payments to support religious instruction and worship. Those schools and the STOs that support them encourage taxpayers to take advantage of the tax credit program in order to further religious education.

25. A.R.S. § 43-1089 does not require or insure that tuition grants of State funds will be available to parents choosing to send their children to non-religious, non-public schools.

26. Because a very large majority (at least 94% in 1998) of STO funds are controlled by religion-specific STOs, parents choosing to send their children to non-religious, non-public schools may be unable to locate an STO willing and able to make a tuition grant to a student attending the non-religious school of the parents' choice. The tax credit scheme is, therefore, not religion-neutral in its operation.

27. Although A.R.S. § 43-1089(D) prohibits a taxpayer from designating his or her donation for the benefit of any dependent of the taxpayer, the statute does not prohibit two taxpayers from each designating his or her donation for the benefit of the other taxpayer's child, or a taxpayer from designating his or her donation for the benefit of

a non-dependent relative (for example, a grandchild).

28. The statute also does not prohibit; for example, two or more religious schools from setting up an STO (like the Brophy Community Foundation, which serves two Catholic schools) and inviting parents to participate in a "contribution exchange," by which each of their children would receive a $500 scholarship paid for by another participating parent. All parents would then be fully reimbursed for their contributions by the State of Arizona.

**Allegations of Law**

29. By affirmatively authorizing and permitting STOs to use State income-tax revenues to pay tuition for students at religious schools, A.R.S. § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution.

30. By affirmatively authorizing and permitting STOs to use State income-tax revenues to make tuition grants to students attending only religious schools or schools of only one religious denomination or to students of only one religion, A.R.S. § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution.

31. By affirmatively authorizing and permitting STOs to use State income-tax revenues to pay tuition for students at schools that discriminate on the basis of religion in selecting students,

§ 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution.

32. As a direct consequence of Defendant Killian's violation of Plaintiffs' constitutional rights, Plaintiffs and other Arizona taxpayers have been and will continue to be irreparably harmed by the diminution of the state general fund through the tax credit program described above.

33. Prior litigation was filed in the Arizona Supreme Court challenging the constitutionality of A.R.S. § 43-1089 (*Kotterman v. Killian*, 972 P.2d 606, *cert. denied*, ___ S. Ct. ___ (1999)). Plaintiffs' Complaint is not barred by res judicata because, among other things, neither Plaintiffs nor the Arizona Civil Liberties Union were parties to or controlled or directed the prior state court litigation, and no challenge was made in that litigation based on the actual practical effect of the statutory scheme, as the lawsuit was filed prior to the effective date of the statute.

**Relief**

Wherefore plaintiffs respectfully request:

A. Preliminary and permanent injunctive relief prohibiting defendant from allowing taxpayers to utilize the tax credit authorized by A.R.S. § 43-1089 for payments made to STOs that make tuition grants to children attending religious schools, to children attending schools of only one religious denomination, or to children selected on the basis of their religion;

B. A declaration that A.R.S. § 43-1089, on its face and as applied, violates the First and Fourteenth Amendments to the United States Constitution by affirmatively authorizing STOs to use State income-tax revenues to pay tuition for students attending religious schools or schools that discriminate on the basis of religion; and

C. An order that Defendant Killian inform all STOs that make tuition grants to children attending religious schools, to children attending schools of only one religious denomination, or to children selected on the basis of their religion, that all funds in their possession as of the date of this Court's order must be paid into the state general fund.

D. An award of attorneys' fees, expert fees, if any, and other costs, pursuant to 42 U.S.C. § 1988(b) and (c), the private attorney general doctrine, and any other applicable authority or rule of equity.

E. All other relief that this Court deems just and appropriate in the circumstances.

DATED this 15th day of February, 2000.

/s/ Marvin S. Cohen
Marvin S. Cohen
Isabel M. Humphrey
Attorneys for Plaintiffs

[SEAL]

**Supreme Court**

**STATE OF ARIZONA**

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**TELEPHONE: (602) 452-3396**

RACHELLE M. RESNICK SUZANNE D. BUNNIN
CLERK OF THE COURT CHIEF DEPUTY CLERK

October 28, 2009

**RE: CHRISTINE A GREEN et al v GARRIOTT/ GOMEZ et al**
**Arizona Supreme Court No. CV-09-0132-PR**
**Court of Appeals Division One**
**No. 1 CA-CV 07-0424**
**Maricopa County Superior Court**
**No. CV 2006-014135**

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 27, 2009, in regard to the above-referenced cause:

**ORDERED: Motion for Leave to Supplement Petition for Review = DENIED.**

**FURTHER ORDERED: Motion to Strike Notice of Supplemental Authority in Support of Amicus Curiae Arizona Education Association = DENIED.**

**FURTHER ORDERED: Motion to Strike Amicus Curiae Arizona Education Association's Notice of Supplemental Authority = DENIED.**

**FURTHER ORDERED: Petition for Review = DENIED.**

Record returned to the Court of Appeals, Division One, Phoenix, this 28th day of October, 2009.

Rachelle M. Resnick, Clerk

TO:
M. Bridget Minder
David L. Abney
Paula S. Bickett
Timothy M. Hogan
Judith M. Dworkin
Benjamin W. Bull
Thomas A. Zlaket
Christopher P. Thomas
Timothy D. Keller
William H. Mellor
Paul Bender
Philip G Urry

sj

**STATE OF ARIZONA**

*Department of Revenue*
*Office of the Director*
*(602) 716-6090*

[SEAL]

*Janice K. Brewer*
**Governor**

*Gale Garriott*
**Director**

## INDIVIDUAL INCOME TAX CREDIT FOR DONATIONS TO PRIVATE SCHOOL TUITION ORGANIZATIONS: REPORTING FOR 2008 EXECUTIVE SUMMARY

- $55,269,528 in donations to private school tuition organizations were reported to the Arizona Department of Revenue for 2008. This is an increase of 1.8% over the $54,303,282 reported for 2007.
- 78,047 donations to private school tuition organizations were reported, an increase of 3.1% over 2007.
- The Department was aware of 55 school tuition organizations operating in Arizona in 2008, the same number as in 2007 but not all the same organizations.
- The average donation in 2008 was $705. This is a decrease from the $714 average in 2007.
- Scholarships paid by school tuition organizations in 2008 totaled $54.1 million, an 11.3% increase over the amount of scholarships paid in 2007.
- The number of scholarships paid in 2008 was 28,324, a 4.3% increase over the 27,153 scholarships paid in 2007.

- 373 private schools in Arizona received scholarship money from school tuition organizations, 14 more than last year.
- 2 school tuition organizations gave scholarships to only one private school.
- 3 school tuition organizations gave scholarships to 100 or more private schools.
- The smallest average scholarship paid by a school tuition organization to a school was $67.50, paid by the Arizona Scholarship Fund to Calvary Christian Academy.
- The largest average scholarship paid by a school tuition organization to a school was $17,083, paid by Arizona Scholarship Fund to the Desert Voices Oral Learning Center.
- The majority of the scholarships (63%) and the scholarship money (66%) was paid to schools in Maricopa County.

## INDIVIDUAL INCOME TAX CREDIT FOR DONATIONS TO PRIVATE SCHOOL TUITION ORGANIZATIONS: REPORTING FOR 2008

Arizona's individual income tax credit for contributions to school tuition organizations, referred to as the private school tax credit, is governed by A.R.S. §43-1089. School tuition organizations (STOs) must report the following information to the Arizona Department of Revenue by February 28:

1. The name, address and contact name of the STO.

2. The number of contributions received in the previous calendar year.

3. The dollar amount of contributions received in the previous calendar year.

4. The number of children[1] awarded scholarships or grants during the previous calendar year.

5. The dollar amount of scholarships and grants awarded during the previous calendar year.

6. The name and address of each qualified school[2] receiving the scholarships or grant money, along with the number and dollar amount of scholarships or grants provided to each school.

The Arizona Department of Revenue is aware of 55 STOs operating in Arizona in 2008, the same number as in 2007. (One new STO formed in 2008, Children's Scholarship Network of Arizona, and one STO disbanded, Engelhardt/Pappas Foundation.) The number and amount of donations are set out in the following

---

[1] The Department of Revenue has determined that "children" as identified in this statute would generally be 18 years or younger.

[2] Qualified school is defined in statute as a "nongovernmental primary school or secondary school or a preschool for handicapped students that is located in this state, that does not discriminate on the basis of race, color, handicap, familial status or national origin . . . " The Department of Revenue has further clarified this by saying that these primary and secondary schools must educate children in a course of study that leads to promotion to the next class or to graduation.

table. For calendar year 2008, $55.3 million has been reported by 55 STOs, a 1.8% increase over the donations reported for 2007.

Arizona Christian School Tuition Organization is the largest school tuition organization in terms of number and amount of donations received. Arizona Christian School Tuition Organization reported $11.6 million in donations, 20.9% of the total. The Catholic Tuition Organization of the Diocese of Phoenix reported $9.8 million in donations, 17.7% of the total reported. These two organizations received nearly 39% of the total donations. Of the 55 STOs reporting for 2008, 30 saw a decline in donations from 2007. To review the donations reported by each STO, see Appendix I at the end of this report.

| Calendar Year | # of STOs | # of Donations | Amount | % change in amount |
|---|---|---|---|---|
| 2008 | 55 | 78,407 | $55,269,528 | 1.8% |
| 2007 | 55 | 76,065 | $54,303,282 | 6.5% |
| 2006[3] | 56 | 73,617 | $51,011,813 | 20.9% |
| 2005[4] | 53 | 69,239 | $42,194,898 | 32.4% |
| 2004 | 53 | 63,830 | $31,871,474 | 8.2% |
| 2003 | 51 | 58,122 | $29,445,494 | 11.2% |

[3] The maximum donation for married filing joint returns increased to $1,000 from $825.

[4] The maximum donation for married filing joint returns increased to $825 from $625.

| | | | | |
|---|---|---|---|---|
| 2002 | 43 | 52,161 | $26,482,993 | 6.3% |
| 2001[5] | 43 | 46,755 | $24,924,656 | 40.8% |
| 2000 | 36 | 38,249 | $17,701,284 | 28.4% |
| 1999 | 33 | 32,023 | $13,781,341 | |
| 1998[6] | 16 | 4,248 | $1,815,798 | |

STOs reported 28,321 scholarships paid for $54.1 million in 2008, an average of $1,909 per scholarship.[7] This is a 4.3% increase in the number of scholarships reported over calendar year 2007 and an 11.3% increase in the total scholarship paid. The following table shows the history of scholarships and grants paid out by STOs, based on information reported to the Department of Revenue. The range of average scholarship amounts paid by the individual STOs is from $516 (Carden Schools Scholarship Fund) to $11,500 (Life Development Institute Scholarship Fund). To review the scholarships paid by each STO, see Appendix II at the end of this report.

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[5] The maximum donation for married filing joint returns increased to $625 from $500.

[6] Activity in 1998 was artificially low due to a court case challenging the constitutionality of the credit based on separation of church and state. The credit was determined to be constitutional.

[7] This does not mean that 27,153 students received scholarships. One student may have received scholarships from more than one STO.

| Calendar Year | # of STOs Reporting | # of Scholarships | Amount | % chg in amount | Average scholarship | % chg in avg |
|---|---|---|---|---|---|---|
| 2008 | 55 | 28,321 | $54,063,195 | 11.3 | $1,909 | 6.8 |
| 2007 | 55 | 27,153 | $48,561,687 | 19.7 | $1,788 | 8.8 |
| 2006 | 56 | 24,678 | $40,557,643 | 31.4 | $1,643 | 19.9 |
| 2005 | 54 | 22,529 | $30,863,153 | 9.4 | $1,370 | 2.7 |
| 2004 | 51 | 21,146 | $28,201,770 | 15.4 | $1,334 | 9.9 |
| 2003 | 49 | 20,134 | $24,437,877 | 7.1 | $1,214 | 4.1 |
| 2002 | 36 | 19,582 | $22,826,746 | 38.5 | $1,166 | 27.7 |
| 2001 | 32 | 18,049 | $16,484,958 | 21.6 | $913 | 1.6 |
| 2000 | 30 | 15,081 | $13,561,981 | 517.4 | $899 | 37.7 |
| 1999 | 17 | 3,365 | $2,196,734 | 2016.5 | $653 | (19.5) |
| 1998[8] | 4 | 128 | $103,790 | | $811 | |

[8] Activity in 1998 was artificially low due to a court case. See Footnote 6.

Average scholarship ranges and the number of STOs with scholarships falling in each range is shown in the following frequency distribution.

| Avg. Scholarship Range | # of STOs | Avg. Scholarship Range | # of STOs |
|---|---|---|---|
| $501-$1,000 | 6 | $3,001-$3,500 | 3 |
| $1,001-$1,500 | 9 | $4,001-$5,000 | 2 |
| $1,501-$2,000 | 17 | $5,001-$7,500 | 4 |
| $2,001-$2,500 | 9 | $7,501-$10,000 | 1 |
| $2,501-$3,000 | 2 | $10,000 and over | 1 |

Of the 54 STOs that actually paid scholarships in 2008 (one newly formed STO, Children's Scholarship Network of Arizona, paid no scholarships), 31 increased their average scholarship amount from the prior year. One STO paid scholarships for the first time, so its average scholarship amount neither increased nor decreased.

STOs provided scholarships and grants to 373 private schools throughout Arizona. There were 20 private schools that received scholarship money in 2007 year that did not receive any scholarship money in 2008.

Arizona Scholarship Fund provided scholarships and grants to 133 schools, more schools than any other STO. Appendix III, at the end of this report, lists the number of schools to which each STO provided scholarships and how many more or less schools received scholarships from the STO in the prior year. For example, Arizona Adventist Scholarships provided

scholarships to 16 schools in 2008, which is the same as last year. That information is aggregated in the following table.

| # of private schools | # of organizations giving to this number of private schools |
|---|---|
| 1 | 2 |
| 2 | 12 |
| 3 | 7 |
| 4 | 9 |
| 5 | 3 |
| 6-10 | 4 |
| 11-20 | 9 |
| 25-99 | 5 |
| 100 or more | 3 |

As shown above, two STOs gave scholarships to only one private school. Those two STOs are Chabad Tuition Organization and Life Development Institute Education Fund. Not mentioned in the table above is one STO that did not pay any scholarships in 2008. Children's Scholarship Network of Arizona is a new STO that will be making its first scholarship awards in 2009.

One private school, Northwest Christian School, received scholarship/grant money from thirteen different STOs. Two private schools, Christ Lutheran School and Desert Christian Unified Schools, received scholarship/grant money from eleven different STOs.

The following table shows the number of STOs contributing scholarship/grant money to the private schools.

| **This many private schools received scholarships or grants from** | **This many STOs** |
|---|---|
| 165 | One STO |
| 65 | Two STOs |
| 57 | Three STOs |
| 40 | Four STOs |
| 14 | Five STOs |
| 13 | Six STOs |
| 9 | Seven STOs |
| 3 | Eight STOs |
| 3 | Nine STOs |
| 1 | Ten STOs |
| 2 | Eleven STOs |
| 1 | Thirteen STOs |

In other words, 165 private schools received scholarship/grant money from only one STO. There were 65 private schools that received scholarship/grant money from two STOs.

The *smallest* average scholarship paid by an STO to one private school was $67.50 paid by the Arizona Scholarship Fund to Calvary Christian Academy. Five private schools received average scholarships from

STOs for more than $10,000. The *highest* average scholarship paid by an STO to one private school was $17,083 paid by Arizona Scholarship Fund to Desert Voices Oral Learning Center.

Seven private schools received more than $1 million total from all STOs. The most scholarship/grant money received by one private school from all STOs was $1,665,318 for 1,074 scholarships ($1,551 average) to Northwest Christian School in Phoenix. Appendix IV lists the 359 private schools that received scholarship/grant money, the number of scholarships, the amount and the average scholarship. This table also shows the percent change in amount of scholarship money received and the percent change in the average scholarship paid if the school also received scholarship money in 2007. (The total number of scholarships shown on Appendix IV totals 28,386, 65 more than the number of scholarships shown on the table on page 3. Two STOs reported that 65 students received scholarships to 2 schools, meaning they switched schools at some point in the calendar year.)

The following table presents the distribution of average scholarships. For example, the average scholarship received by seven private schools was between $1 and $250. The average scholarship received by 15 private schools was between $251 and $500.

| Avg. Scholarship Range | # of Private Schools with Avg. Scholarships in this Range[9] | Avg. Scholarship Range | # of Private Schools with Avg. Scholarships in this Range |
|---|---|---|---|
| $1-$250 | 5 | $2,501-$3,000 | 23 |
| $251-$500 | 16 | $3,001-$4,000 | 30 |
| $501-$1,000 | 49 | $4,001-$5,000 | 14 |
| $1,001-$1,500 | 91 | $5,001-$7,500 | 15 |
| $1,501-$2,000 | 72 | $7,501-$10,000 | 1 |
| $2,001-$2,500 | 53 | > $10,001 | 4 |

In terms of where the scholarship/grant money went within Arizona, the most money went to schools within the city of Phoenix. Almost 32% of the scholarships went to 80 private schools in Phoenix and about 36% of the money. As would be expected, 63% of all scholarships granted went to schools in Maricopa County and 66% of the money, nearly the same percentages as in 2007. The following table

[9] The average scholarship tallied here is total scholarship on average from all STOs.

shows the number of scholarships the amount of scholarships and the average scholarship paid out by county.

| County | # of Scholarships | Scholarship $ | Avg. Scholarship |
|---|---|---|---|
| Apache | 257 | $480,507 | $1,870 |
| Cochise | 402 | $544,349 | $1,354 |
| Coconino | 271 | $530,582 | $1,958 |
| Gila | 278 | $586,100 | $2,108 |
| Graham | 89 | $56,103 | $630 |
| Greenlee | 0 | $0 | $0 |
| La Paz | 10 | $9,300 | $930 |
| Maricopa | 17,963 | $35,777,394 | $1,992 |
| Mohave | 250 | $406,556 | $1,626 |
| Navajo | 417 | $633,957 | $1,520 |
| Pima | 6,271 | $11,900,305 | $1,898 |
| Pinal | 309 | $363,004 | $1,174 |
| Santa Cruz | 257 | $174,010 | $677 |
| Yavapai | 820 | $1,508,452 | $1,840 |
| Yuma | 792 | $1,092,594 | $1,380 |

Appendix V shows the cities within which the scholarship/grant money was received, the average scholarship and the percent change from 2007. It also shows the rank for 2008 and for 2007, which indicates the city or town with the highest average scholarship (Mayer #1 with an average scholarship of $4,966) to

the lowest average scholarship (Holbrook #65 with an average scholarship of $229).

## APPENDIX I

## 2008 DONATIONS RECEIVED BY SCHOOL TUITION ORGANIZATION

| SCHOOL TUITION ORGANIZATION | # of 2008 donations | 2008 donations | % chg in #[10] | % chg in $ |
|---|---|---|---|---|
| Alternative Schools Scholarship Fund | 29 | $16,950 | 0.0 | (12.6) |
| Arizona Adventist Scholarships | 665 | $443,760 | 2.6 | (1.6) |
| Arizona Christian School Tuition Organization | 15,522 | $11,554,910 | 2.2 | 1.5 |
| Arizona Episcopal Schools Foundation | 1,184 | $950,806 | 2.5 | (2.5) |
| Arizona Independent Schools Scholarship Foundation | 1,168 | $840,860 | (6.4) | (6.7) |
| Arizona International Academy Scholarship Fund | 86 | $64,804 | 1.2 | 7.4 |
| Arizona Lutheran Scholarship Organization | 269 | $195,051 | (12.4) | (5.6) |
| Arizona Native Scholastic & Enrichment Resources | 57 | $39,275 | (23.0) | (19.6) |
| Arizona Private Education Scholarship Fund | 1,617 | $1,272,939 | 50.8 | 49.0 |
| Arizona Scholarship Fund | 8,271 | $6,160,160 | 14.5 | 13.8 |
| Arizona School Choice Trust | 1,681 | $1,507,633 | (7.3) | (9.9) |
| Arizona Tuition Organization | 1,856 | $1,350,950 | 10.9 | 9.3 |
| Arizona Waldorf Scholarship Fund | 211 | $122,642 | 8.8 | 10.6 |
| BEST Student Fund | 265 | $208,220 | (4.3) | (3.9) |
| Brophy Community Foundation | 1,554 | $1,123,273 | (2.3) | (8.7) |
| Carden Schools Scholarship Fund | 0 | $0 | (100.0) | (100.0) |
| Catholic Tuition Organization of the Diocese of Phoenix | 14,115 | $9,783,082 | (4.8) | (8.2) |
| Catholic Tuition Organization for the Diocese of Tucson | 8,524 | $4,371,392 | (1.3) | (6.1) |
| Chabad Tuition Organization | 237 | $142,510 | (9.2) | (8.7) |
| Chaparral Mission Scholarship Fund | 276 | $176,201 | (18.6) | (12.8) |
| Cheder Scholarship Organization | 877 | $783,157 | 8.3 | 41.4 |
| Children's Scholarship Network of Arizona | 83 | $47,060 | N/A | N/A |
| Christ Lutheran School Foundation | 302 | $207,358 | 0.0 | (0.9) |
| Christian Scholarship Fund of Arizona | 577 | $408,350 | (19.9) | (13.7) |
| Classical Christian Scholarship Fund | 0 | $0 | (100.0) | (100.0) |
| Cochise Christian School Tuition Organization | 576 | $343,892 | 53.2 | 22.1 |
| Dynamite Montessori Foundation | 49 | $33,325 | 88.5 | 61.3 |
| Educare Scholarship Fund | 14 | $10,290 | (90.4) | (89.7) |
| Flagstaff Christian Scholarship Fund | 378 | $235,017 | (1.8) | (3.0) |
| Foundation for Lutherans Interested in Funding Education | 80 | $53,510 | (13.0) | (18.9) |
| Foundation for Montessori Scholarships | 87 | $56,530 | 1.2 | 4.1 |
| Higher Education for Lutheran Program | 1,620 | $1,145,615 | (5.4) | (5.2) |
| Institute for Better Education | 6,298 | $4,615,726 | 19.0 | 20.5 |
| Jewish Tuition Organization[11] | 2,549 | $1,770,732 | (13.4) | (11.8) |
| Life Development Institute Education Foundation | 25 | $17,300 | 127.3 | 73.0 |
| Lutheran Education Foundation | 243 | $149,663 | 41.3 | (20.1) |
| Maricopa County Schoolhouse Foundation | 226 | $138,342 | 61.4 | 53.5 |
| Montessori Centre School Tuition Organization | 103 | $77,132 | 3.0 | 4.2 |
| Montessori Scholarship Organization | 411 | $328,700 | 11.1 | 26.6 |
| New Valley Education Partners | 297 | $266,851 | 17.9 | (1.9) |
| Northern Arizona Christian School Scholarship Fund | 482 | $300,659 | 19.3 | 12.4 |
| Orme Primavera Schools Foundation | 305 | $215,088 | (2.6) | (3.6) |
| Pinetop Tuition Support Organization | 20 | $18,500 | 122.2 | 106.7 |
| Christian Scholarship Foundation[12] | 386 | $236,862 | 7.8 | 3.3 |
| School Choice Arizona | 283 | $180,408 | 132.0 | 151.8 |
| School Tuition Association of Yuma | 464 | $334,285 | (3.9) | (10.2) |
| Schools With Heart Foundation | 427 | $292,203 | 3.1 | (1.8) |

[10] NA indicates that the STO was not operational in the prior year.
[11] Formerly Jewish Community Day School Scholarship Fund
[12] Formerly Prescott Christian School Scholarship Foundation

## APPENDIX I
## 2008 DONATIONS RECEIVED BY SCHOOL TUITION ORGANIZATION

| SCHOOL TUITION ORGANIZATION | # of 2008 donations | 2008 donations | % chg in # | % chg in $ |
|---|---|---|---|---|
| Shepherd of the Desert Foundation | 185 | $138,950 | 19.4 | 18.0 |
| Southern Arizona Foundation for Education | 477 | $342,426 | (2.9) | (1.9) |
| Tempe Montessori's Parents Organization | 263 | $179,800 | 48.6 | 34.0 |
| Tuition Organization for Private Schools | 1,723 | $1,270,106 | 6.9 | 7.8 |
| Valley Lutheran Scholarship Organization | 162 | $98,265 | 8.0 | (7.2) |
| VVBC Christian Education Fund | 37 | $28,800 | (14.0) | (10.8) |
| White Mountain Tuition Support Foundation | 198 | $132,220 | 9.4 | 14.7 |
| Yuma's Education Scholarship Fund for Kids | 613 | $487,389 | 23.6 | 40.9 |
| **TOTAL** | **78,407** | **$55,269,528** | **3.1** | **1.8** |

## APPENDIX II
## 2008 SCHOLARSHIPS PAID BY SCHOOL TUITION ORGANIZATION

| SCHOOL TUITION ORGANIZATION | # of 2008 scholarships | 2008 scholarships | % chg in # | % chg in $ | Average scholarship | % chg in average |
|---|---|---|---|---|---|---|
| Alternative Schools Scholarship Fund | 25 | $14,700 | (13.8) | (15.8) | $588.00 | (2.3) |
| Arizona Adventist Scholarships | 793 | $446,855 | (14.2) | (9.4) | $563.50 | 5.6 |
| Arizona Christian School Tuition Organization | 5,584 | $10,964,557 | 3.3 | 5.8 | $1,963.57 | 2.5 |
| Arizona Episcopal Schools Foundation | 219 | $1,001,505 | 10.1 | 14.1 | $4,573.08 | 3.7 |
| Arizona Independent Schools Scholarship Foundation | 111 | $803,743 | 2.8 | (4.5) | $7,240.93 | (7.1) |
| Arizona International Academy Scholarship Fund | 30 | $58,675 | 3.4 | 1.1 | $1,955.83 | (2.3) |
| Arizona Lutheran Scholarship Organization | 44 | $85,450 | (42.1) | (65.0) | $2,458.26 | (10.6) |
| Arizona Native Scholastic & Enrichment Resources | 5 | $8,600 | (16.7) | (10.4) | $1,720.00 | 7.5 |
| Arizona Private Education Scholarship Fund | 480 | $779,616 | 40.4 | 46.8 | $1,624.20 | 4.6 |
| Arizona Scholarship Fund | 2,824 | $5,369,173 | 44.5 | 42.5 | $1,901.27 | (1.4) |
| Arizona School Choice Trust | 1,202 | $2,527,279 | 6.1 | 12.8 | $2,102.56 | 6.3 |
| Arizona Tuition Organization | 726 | $1,234,638 | 10.0 | 10.0 | $1,700.60 | 0.0 |
| Arizona Waldorf Scholarship Fund | 63 | $107,386 | 46.5 | (5.7) | $1,704.54 | (35.7) |
| BEST Stucent Fund | 96 | $213,284 | 10.3 | (7.5) | $2,221.71 | (17.2) |
| Brophy Community Foundation | 395 | $1,319,465 | 14.5 | 46.0 | $3,340.42 | 27.6 |
| Carden Schools Scholarship Fund | 2 | $1,032 | (33.3) | 3.2 | $516.00 | 54.8 |
| Catholic Tuition Organization of the Diocese of Phoenix | 5,663 | $10,380,028 | (5.9) | 3.4 | $1,832.96 | 9.8 |
| Catholic Tuition Support Organization for the Diocese of Tucson | 2,854 | $4,467,544 | (7.1) | 3.5 | $1,565.36 | 11.4 |
| Chabad Tuition Organization | 25 | $100,000 | (34.2) | (23.1) | $4,000.00 | 16.9 |
| Chaparral Mission Scholarship Fund | 118 | $197,944 | (9.9) | (3.4) | $1,677.49 | 7.3 |
| Cheder Scholarship Organization | 99 | $673,780 | 11.2 | 27.9 | $6,805.86 | 14.9 |
| Children's Scholarship Network of Arizona | 0 | $0 | N/A | N/A | $0 | N/A |
| Christ Lutheran School Foundation | 68 | $169,626 | 15.3 | 1.9 | $2,494.50 | (11.6) |
| Christian Scholarship Fund of Arizona | 294 | $472,698 | (20.1) | (12.5) | $1,607.82 | 9.6 |
| Classical Christian Scholarship Fund | 8 | $10,244 | (27.3) | (65.8) | $1,268.00 | (53.0) |
| Cochise Christian School Tuition Organization | 210 | $380,949 | 26.5 | 33.4 | $1,814.04 | 5.4 |
| Dynamite Montessori Foundation | 46 | $26,295 | 12.2 | 23.6 | $571.63 | 10.1 |
| Educare Scholarship Fund | 79 | $96,713 | 6.8 | (5.0) | $1,224.22 | (11.0) |
| Flagstaff Christian Scholarship Fund | 83 | $179,300 | 1.2 | (1.8) | $2,160.24 | (3.0) |
| Foundation for Lutherans Interested in Funding Education | 55 | $67,265 | (15.4) | 3.5 | $1,223.00 | 22.4 |
| Foundation for Montessori Scholarships | 40 | $57,800 | 48.1 | 5.5 | $1,445.00 | (28.8) |
| Higher Education for Lutheran Program | 820 | $1,170,507 | 5.5 | 10.4 | $1,427.45 | 4.6 |
| Institute for Better Education | 2,290 | $3,784,240 | 24.1 | 42.6 | $1,652.51 | 14.9 |
| Jewish Tuition Organization | 389 | $2,172,669 | 3.2 | 10.0 | $5,585.27 | 6.6 |
| Life Development Institute Education Foundation | 2 | $23,000 | 0.0 | 130.0 | $11,500.00 | 2.3 |
| Lutheran Education Foundation | 87 | $209,218 | (11.2) | (21.6) | $2,404.80 | (11.7) |
| Maricopa County Schoolhouse Foundation | 57 | $117,864 | 100.0 | 100.0 | $2,067.79 | (75.7) |
| Montessori Centre School Tuition Organization | 78 | $77,000 | 4.0 | 4.1 | $987.18 | 0.1 |
| Montessori Scholarship Organization | 140 | $292,792 | (22.7) | 6.8 | $2,091.37 | 38.0 |
| New Valley Education Partners | 29 | $240,423 | (9.4) | (2.1) | $8,290.45 | 8.0 |
| Northern Arizona Christian School Scholarship Fund | 150 | $261,000 | (15.3) | 5.9 | $1,740.00 | 25.0 |

## APPENDIX II

## 2008 SCHOLARSHIPS PAID BY SCHOOL TUITION ORGANIZATION

| SCHOOL TUITION ORGANIZATION | # of 2008 scholarships | 2008 scholarships | % chg in # | % chg in $ | Average scholarship | % chg in average |
|---|---|---|---|---|---|---|
| Orme Primavera Schools Foundation | 51 | $212,570 | (19.0) | (3.0) | $4,168.04 | 19.9 |
| Pinetop Tuition Support Organization | 9 | $8,960 | 125.0 | 316.7 | $995.56 | 85.2 |
| Christian Scholarship Foundation[1] | 121 | $219,446 | (12.3) | (18.5) | $1,813.60 | (7.0) |
| School Choice Arizona | 8 | $65,909 | 100.0 | 100.0 | $8,238.63 | NA |
| School Tuition Association of Yuma | 291 | $321,962 | (16.1) | (7.1) | $1,106.40 | 10.8 |
| Schools With Heart Foundation | 77 | $302,666 | 5.5 | 15.9 | $3,930.73 | 9.9 |
| Shepherd of the Desert Education Program | 77 | $101,374 | 16.7 | 22.9 | $1,316.55 | 5.4 |
| Southern Arizona Foundation for Education | 197 | $316,190 | (8.4) | (10.4) | $1,605.03 | (2.3) |
| Tempe Montessori's Parents Organization | 48 | $128,825 | (17.2) | (29.3) | $2,683.85 | (14.6) |
| Tuition Organization for Private Schools | 778 | $1,154,783 | 11.0 | 24.9 | $1,484.30 | 12.5 |
| Valley Lutheran Scholarship Organization | 66 | $120,986 | 37.5 | (3.6) | $1,833.12 | (29.9) |
| VVBC Christian Education Fund | 12 | $31,435 | 9.1 | (15.4) | $2,619.59 | (22.5) |
| White Mountain Tuition Support Foundation | 39 | $97,495 | 34.5 | (1.0) | $2,499.87 | (26.4) |
| Yuma's Education Scholarship Fund for Kids | 264 | $435,839 | 38.9 | 56.3 | $1,650.91 | 12.5 |
| **Total** | **28,321** | **$54,063,195** | **4.3** | **11.3** | **$1,908.94** | **6.8** |

[1] Formerly Prescott Christian School Scholarship Foundation

## APPENDIX III
## NUMBER OF SCHOOLS TO WHICH SCHOLARSHIPS/GRANTS WERE PROVIDED BY SCHOOL TUITION ORGANZIATION

| SCHOOL TUITION ORGANIZATION | # of schools to which scholarships/grants were provided | # change from prior year |
|---|---|---|
| Alternative Schools Scholarship Fund | 3 | (1) |
| Arizona Adventist Scholarships | 16 | 0 |
| Arizona Christian School Tuition Organization | 122 | 7 |
| Arizona Episcopal Schools Foundation | 5 | 0 |
| Arizona Independent Schools Scholarship Foundation | 3 | 0 |
| Arizona International Academy Scholarship Fund | 5 | 0 |
| Arizona Lutheran Scholarship Organization | 5 | (5) |
| Arizona Native Enrichment and Scholastic Resources | 4 | 0 |
| Arizona Private Education Scholarship Fund | 45 | 6 |
| **Arizona Scholarship Fund** | **157** | **24** |
| Arizona School Choice Trust | 124 | 6 |
| Arizona Tuition Organization | 8 | (2) |
| Arizona Waldorf Scholarship Fund | 2 | 0 |
| BEST Student Fund | 2 | 0 |
| Brophy Community Foundation | 20 | 4 |
| Carden Schools Scholarship Fund | 2 | 0 |
| Catholic Tuition Organization of the Diocese of Phoenix | 38 | 1 |
| Catholic Tuition Support Organization for the Diocese of Tucson | 25 | (1) |
| Chabad Tuition Organization | 1 | (1) |
| Chaparral Mission Scholarship Fund | 3 | 0 |
| Cheder Scholarship Organization | 2 | 0 |
| Christ Lutheran School Foundation | 3 | 1 |
| Christian Scholarship Fund of Arizona | 15 | 0 |
| Classical Christian Scholarship Fund | 6 | 1 |
| Cochise Christian School Tuition Organization | 13 | 2 |
| Dynamite Montessori Foundation | 4 | 0 |
| Educare Scholarship Fund | 4 | (1) |
| Flagstaff Christian Scholarship Fund | 3 | (1) |
| Foundation for Lutherans Interested in Funding Education | 2 | 0 |
| Foundation for Montessori Scholarships | 4 | 1 |
| Higher Education for Lutheran Program | 14 | (1) |
| Institute for Better Education | 96 | 14 |
| Jewish Tuition Organization | 6 | 0 |
| Life Development Institute Education Foundation | 1 | 0 |
| Lutheran Education Foundation | 12 | 1 |
| Maricopa County Schoolhouse Foundation | 4 | 3 |
| Montessori Centre School Tuition Organization | 4 | 0 |
| Montessori Scholarship Organization | 13 | 2 |
| New Valley Education Partners | 2 | 0 |
| Northern Arizona Christian School Scholarship Fund | 4 | 0 |
| Orme Primavera Schools Foundation | 2 | 0 |
| Pinetop Tuition Support Organization | 2 | 0 |
| School Choice Arizona | 2 | NA |

## APPENDIX III
## NUMBER OF SCHOOLS TO WHICH SCHOLARSHIPS/GRANTS WERE PROVIDED BY SCHOOL TUITION ORGANZIATION

| SCHOOL TUITION ORGANIZATION | # of schools to which scholarships/grants were provided | # change from prior year |
|---|---|---|
| Christian Scholarship Foundation[14] | 2 | 0 |
| School Tuition Association of Yuma | 9 | (2) |
| Schools With Heart Foundation | 3 | 0 |
| Shepherd of the Desert Education Program | 12 | 2 |
| Southern Arizona Foundation for Education | 4 | 1 |
| Tempe Montessori's Parents Organization | 2 | (2) |
| Tuition Organization for Private Schools | 71 | 14 |
| Valley Lutheran Scholarship Organization | 2 | 0 |
| VVBC Christian Education Fund | 4 | 0 |
| White Mountain Tuition Support Foundation | 3 | 1 |
| Yuma's Education Scholarship Fund for Kids | 13 | 6 |

[14] Formerly Prescott Christian School Scholarship Foundation

# APPENDIX IV

## NUMBER AND AMOUNT OF SCHOLARSHIPS RECEIVED BY SCHOOL

| School | # of Scholarships | Scholarship $ | % chg from 2007 | Avg. Scholarship | % chg from 2007 |
|---|---|---|---|---|---|
| 2nd Street Children's School | 9 | $20,561 | 281.5 | $2,285 | 112.0 |
| 91st Psalms Christian School | 102 | $121,585 | 11.3 | $1,192 | 13.5 |
| Abbie Loveland Tuller | 48 | $152,742 | (0.3) | $3,182 | (4.5) |
| Abiding Savior School | 13 | $26,736 | (24.4) | $2,057 | (12.8) |
| Adobe Adventist Christian School | 25 | $11,538 | 22.4 | $462 | 52.0 |
| Ahwatukee Foothills Montessori | 3 | $6,930 | NA | $2,310 | NA |
| Aldea Montessori | 14 | $35,652 | 22.1 | $2,547 | 100.6 |
| Aletheia Classical Christian School | 19 | $29,847 | 179.8 | $1,571 | 17.8 |
| Al-Huda School | 19 | $47,265 | 22.8 | $2,488 | (9.5) |
| All Saint's Episcopal Day School | 47 | $340,672 | 27.2 | $7,248 | 8.2 |
| American Indian Christian School | 67 | $153,842 | 0.2 | $2,296 | 43.6 |
| Angels in Training Learning Center | 4 | $5,531 | 514.6 | $1,383 | 53.7 |
| Apostolic Faith Center Christian Academy | 13 | $16,875 | (6.3) | $1,298 | 15.4 |
| Arcadia Montessori School | 3 | $10,023 | (9.8) | $3,341 | 50.3 |
| Arizona Cultural Academy | 122 | $297,872 | 46.0 | $2,442 | (1.9) |
| Arizona International Academy | 24 | $51,200 | 5.7 | $2,133 | 1.3 |
| Arizona Lutheran Academy | 154 | $332,305 | 2.4 | $2,158 | 8.4 |
| Arrowhead Christian Academy | 135 | $182,948 | 12.8 | $1,355 | 7.8 |
| Arrowhead Montessori Academy | 1 | $3,500 | NA | $3,500 | NA |
| ASCEND | 1 | $1,000 | NA | $1,000 | NA |
| Ascension Lutheran School | 55 | $101,545 | 19.1 | $1,846 | (22.0) |
| Atonement Lutheran School | 76 | $138,729 | 11.1 | $1,825 | (18.1) |
| Awakening Seed School | 19 | $73,987 | 27.6 | $3,894 | 0.7 |
| Barness Family East Valley Jewish Community Center Day School | 21 | $80,655 | (16.9) | $3,841 | 18.7 |
| Beautiful Savior Academy | 18 | $27,410 | (25.1) | $1,523 | (0.0) |
| Bella Vista Private School | 13 | $40,320 | 26.2 | $3,102 | (32.0) |
| Bethany Christian School (Lake Havasu) | 13 | $9,573 | (28.9) | $736 | (12.5) |
| Bethany Christian School (Tempe) | 225 | $478,723 | 14.7 | $2,128 | 0.7 |
| Bethany Learning Center | 44 | $69,842 | 37.8 | $1,587 | (15.5) |
| Bios Christian Academy | 20 | $35,697 | NA | $1,785 | NA |
| Blessed Sacrament Kindergarten | 9 | $46,465 | 25.1 | $5,163 | 80.7 |
| Bourgade Catholic High School | 363 | $874,039 | (1.2) | $2,408 | (2.0) |
| Brophy College Preparatory | 279 | $1,570,044 | 38.5 | $5,627 | 10.2 |
| Calvary Baptist School | 19 | $20,596 | (16.6) | $1,084 | 40.4 |
| Calvary Chapel Christian School | 98 | $180,749 | (3.6) | $1,844 | (3.6) |
| Calvary Christian Academy (Lake Havasu City) | 144 | $286,460 | 17.6 | $1,989 | 8.6 |
| Calvary Christian Academy (Tempe) | 1 | $1,497 | NA | $1,497 | NA |
| Calvary Christian School (Queen Creek) | 55 | $66,937 | 55.3 | $1,217 | (9.7) |
| Camelback Christian School | 2 | $7,352 | 24.3 | $3,676 | 24.3 |
| Camelback Desert School (Scottsdale) | 1 | $3,915 | (86.0) | $3,915 | 26.2 |
| Camelback Desert School (Paradise Valley) | 6 | $24,249 | 575.6 | $4,041 | 125.1 |
| Camp Verde United Christian School | 126 | $110,501 | 17.0 | $877 | 25.3 |
| Carden Christian Academy | 31 | $36,520 | 26.4 | $1,178 | 6.0 |
| Carden of the Peaks Academy | 1 | $600 | 20.0 | $600 | 140.0 |
| Casas Christian School | 419 | $686,212 | 6.5 | $1,638 | 0.2 |
| Casas Ninos School of Montessori | 3 | $2,610 | (41.6) | $870 | (22.2) |
| Castlehill Country Day School | 44 | $95,141 | (3.5) | $2,162 | (5.7) |
| Cathedral Christian Academy | 1 | $5,200 | (71.5) | $5,200 | 327.6 |
| Cathedral of Praise Christian School | 3 | $4,755 | (47.2) | $1,585 | 146.1 |
| Chandler Christian School | 117 | $185,288 | 13.6 | $1,584 | 4.8 |
| Chaparral Church Kindergarten | 17 | $31,393 | 64.0 | $1,847 | 54.3 |

## APPENDIX IV

## NUMBER AND AMOUNT OF SCHOLARSHIPS RECEIVED BY SCHOOL

| School | # of Scholarships | Scholarship $ | % chg from 2007 | Avg. Scholarship | % chg from 2007 |
|---|---|---|---|---|---|
| Chapel in the Hills | 36 | $39,500 | 10.5 | $1,097 | 44.2 |
| Christ Church School | 5 | $19,050 | (40.0) | $3,810 | 44.8 |
| Christ Greenfield Lutheran School | 166 | $396,855 | (5.5) | $2,391 | 11.0 |
| Christ Lutheran School | 190 | $380,829 | 11.4 | $2,004 | (4.4) |
| Christ the King Academy | 3 | $3,773 | (44.9) | $1,258 | 10.3 |
| Christ the King Catholic School | 214 | $213,520 | 0.4 | $998 | (3.3) |
| Christ the Redeemer Lutheran | 60 | $76,202 | (16.7) | $1,270 | 15.2 |
| Christian Academy of Prescott | 140 | $177,733 | (7.1) | $1,270 | (22.3) |
| Chrysalis Academy | 3 | $8,020 | NA | $2,673 | NA |
| Community Montessori School | 5 | $10,700 | (47.1) | $2,140 | 58.6 |
| Congregation Anshei Israel | 5 | $18,040 | 75.8 | $3,608 | 40.7 |
| Copper Canyon Christian School | 2 | $900 | NA | $450 | NA |
| Cornerstone Christian Academy (Chandler) | 1 | $360 | NA | $360 | NA |
| Cornerstone Christian Academy (Cottonwood) | 7 | $15,247 | 35.8 | $2,178 | 93.9 |
| Cornerstone Christian Academy (Goodyear) | 2 | $1,000 | NA | $500 | NA |
| Cornerstone Christian Academy (Tucson) | 164 | $348,789 | 2.4 | $2,127 | 2.5 |
| Cross of Christ Christian School | 68 | $111,958 | 36.3 | $1,646 | (17.8) |
| Cross of Glory Lutheran School | 23 | $39,860 | 14.5 | $1,733 | (20.1) |
| Cross Roads Preschool & Kindergarten | 2 | $3,275 | 13.7 | $1,637 | (14.7) |
| Crossroads Community School | 109 | $173,804 | (6.0) | $1,595 | (10.7) |
| Dayspring Kindergarten | 29 | $63,625 | 3.1 | $2,194 | 13.7 |
| Desert Christian Schools | 529 | $1,000,994 | 16.9 | $1,892 | 6.3 |
| Desert Garden Montessori | 44 | $107,487 | 8.6 | $2,443 | (6.2) |
| Desert Montessori | 3 | $6,128 | NA | $2,043 | NA |
| Desert Shadows Montessori | 3 | $7,785 | (39.4) | $2,595 | 1.0 |
| Desert Sky Montessori | 2 | $900 | NA | $450 | NA |
| Desert Springs Christian Kindergarten | 16 | $22,068 | (53.4) | $1,379 | (1.0) |
| Desert Sun Child Development Center | 31 | $66,576 | 146.6 | $2,148 | 43.2 |
| Desert Valley Christian School | 65 | $18,122 | (0.2) | $279 | 39.5 |
| Desert View Learning Center | 23 | $99,072 | (0.5) | $4,307 | (9.2) |
| Desert Voices Oral Learning Center | 6 | $102,499 | NA | $17,083 | NA |
| Desert Willow Educational Services | 3 | $3,250 | 235.7 | $1,083 | 123.8 |
| Dobson Montessori School | 84 | $115,464 | 49.8 | $1,375 | 21.2 |
| Dove Christian School | 27 | $32,093 | 3.1 | $1,189 | (16.0) |
| Dynamite Montessori | 38 | $27,044 | 34.0 | $712 | 16.3 |
| East Fork Lutheran School | 85 | $46,220 | (10.3) | $544 | (27.2) |
| East Valley Christian Academy | 2 | $1,380 | 50.0 | $690 | (25.0) |
| El Dorado Private School | 13 | $29,342 | 343.6 | $2,257 | 138.8 |
| Emmanuel Christian Academy | 29 | $34,735 | 14.7 | $1,198 | 46.3 |
| Emmanuel Evangelical Lutheran School | 118 | $142,516 | 22.0 | $1,208 | 1.9 |
| Emmaus Lutheran School | 48 | $69,861 | 14.4 | $1,456 | 23.9 |
| Enchanted Desert School | 62 | $107,086 | (5.7) | $1,727 | (36.2) |
| Faith Christian School | 52 | $74,421 | 8.3 | $1,431 | (13.4) |
| Faith Community Academy | 66 | $98,504 | 30.5 | $1,492 | 24.5 |
| Faith Lutheran School | 45 | $58,511 | (22.3) | $1,300 | (22.3) |
| Family Life Academy | 58 | $99,071 | 9.4 | $1,708 | 35.8 |
| Family of Christ Learning Center | 3 | $4,278 | (62.9) | $1,426 | (1.0) |
| Family of God Lutheran School | 14 | $16,410 | 187.7 | $1,172 | 23.2 |
| Fellowship Children's Development Center | 6 | $12,282 | (4.0) | $2,047 | 28.0 |



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## APPENDIX IV
## NUMBER AND AMOUNT OF SCHOLARSHIPS RECEIVED BY SCHOOL

| School | # of Scholarships | Scholarship $ | % chg from 2007 | Avg. Scholarship | % chg from 2007 |
|---|---|---|---|---|---|
| Firm Foundations | 49 | $49,412 | 44.0 | 1,008 | 20.4 |
| First Baptist Christian Academy | 67 | $75,646 | (4.8) | $1,129 | (16.1) |
| First Southern Christian School | 58 | $89,953 | 15.4 | $1,551 | 33.4 |
| Flagstaff Community Christian School | 18 | $114,773 | 16.6 | $6,378 | 94.3 |
| Florence Baptist Academy | 3 | $1,380 | 50.0 | $460 | (50.0) |
| Foundation of Blind Children PreSchool | 6 | $60,757 | NA | $10,126 | NA |
| Fountain of Life Lutheran School | 121 | $161,039 | (2.0) | $1,331 | 6.1 |
| Freedom Christian Academy | 53 | $71,367 | 59.8 | $1,347 | 5.6 |
| Freedom Christian School (Arizona City) | 3 | $4,065 | 171.0 | $1,355 | 171.0 |
| Full Gospel Christian Academy | 2 | $1,012 | 120.0 | $506 | 120.0 |
| Gateway Baptist Academy (Gilbert) | 51 | $23,988 | (32.3) | $470 | (43.0) |
| Gateway Baptist Academy (Scottsdale) | 5 | $18,460 | NA | $3,692 | NA |
| Gateways School (Tucson) | 2 | $1,800 | (82.0) | $900 | (37.1) |
| Gethsemane Lutheran School | 108 | $227,112 | 37.4 | $2,103 | 17.0 |
| Gilson Wash Baptist School | 8 | $8,186 | (31.1) | $1,023 | 11.9 |
| Glendale Christian Academy | 135 | $158,958 | 98.2 | $1,177 | 14.5 |
| Glenview Adventist School | 82 | $64,996 | 19.2 | $793 | 45.5 |
| Good Shepherd Lutheran School | 14 | $16,522 | (3.6) | $1,180 | (10.5) |
| Gospel Light Christian Academy | 3 | $1,800 | 300.0 | $600 | 33.3 |
| Grace Chapel Christian School | 5 | $4,000 | (31.2) | $800 | (17.5) |
| Grace Community Christian School | 288 | $671,891 | (7.6) | $2,333 | 4.9 |
| Grace Fellowship Academy | 75 | $82,223 | 33.5 | $1,096 | (18.1) |
| Grace Lutheran School | 94 | $121,789 | 41.1 | $1,296 | 18.6 |
| Graysmark Academy | 3 | $3,600 | NA | $1,200 | NA |
| Green Fields Country Day School | 40 | $223,208 | (5.0) | $5,580 | (0.2) |
| Guiding Light Christian Partnership | 4 | $2,010 | 67.4 | $503 | (16.3) |
| Guiding Light School | 17 | $38,727 | (33.1) | $2,278 | (9.5) |
| Hand in Hand Christian School | 8 | $8,220 | 2044.4 | $1,027 | 250.4 |
| Happy Trails School | 5 | $5,475 | (43.0) | $1,095 | (31.6) |
| Harvest Christian Academy | 9 | $14,795 | 53.2 | $1,644 | 19.2 |
| Heritage Christian Academy | 117 | $195,629 | (22.2) | $1,672 | (12.2) |
| Highland Free School | 23 | $12,000 | (8.1) | $522 | 0.0 |
| Holbrook Indian School | 82 | $18,782 | 21.4 | $229 | (8.0) |
| Holy Angel School | 64 | $120,392 | (9.1) | $1,881 | (10.5) |
| Holy Cross Evangelical Lutheran School | 9 | $8,005 | 48.2 | $889 | 48.2 |
| Holy Trinity Academy | 10 | $36,352 | 53.5 | $3,635 | 7.4 |
| Hope Mission School | 80 | $186,730 | 5.4 | $2,334 | 17.2 |
| Howard S. Gray Education Center | 2 | $14,490 | 28.5 | $7,245 | 28.5 |
| Imago Dei Middle School | 37 | $197,404 | 537.1 | $5,335 | 37.5 |
| Immaculate Conception School | 91 | $84,280 | (21.8) | $926 | 12.4 |
| Immaculate Heart Academy | 160 | $320,183 | 34.8 | $2,001 | 28.9 |
| International Christian Academy Online | 1 | $552 | 196.8 | $552 | 196.8 |
| International School of Arizona | 21 | $45,203 | 60.2 | $2,153 | (8.5) |
| International School of Tucson | 31 | $75,048 | 260.1 | $2,421 | 27.8 |
| Jess Schwartz Jewish Community High School | 48 | $346,005 | (6.8) | $7,208 | (0.9) |
| Joanne Todd Christian School | 29 | $27,957 | (0.5) | $964 | 23.6 |
| Journeys Academy | 4 | $5,250 | 250.0 | $1,450 | 93.3 |
| Joy Community Christian School | 262 | $590,418 | 1.7 | $2,254 | (2.6) |
| Joyful Beginnings Academy | 14 | $41,840 | 47.1 | $2,989 | 89.2 |
| Keystone Montessori | 27 | $70,815 | 65.3 | $2,623 | 22.5 |
| Khalsa Montessori School (Tucson) | 16 | $26,509 | (5.6) | $1,657 | 0.3 |

## APPENDIX IV

## NUMBER AND AMOUNT OF SCHOLARSHIPS RECEIVED BY SCHOOL

| School | # of Scholarships | Scholarship $ | % chg from 2007 | Avg. Scholarship | % chg from 2007 |
|---|---|---|---|---|---|
| King David School | 77 | $430,162 | 13.8 | $5,587 | (3.7) |
| Kingman Adventist School | 22 | $10,520 | (49.9) | $478 | 20.7 |
| Kino Learning Center | 19 | $93,330 | 38.6 | $4,912 | 16.7 |
| Lamad Preparatory Academy | 3 | $1,495 | 49.5 | $498 | (0.4) |
| Lamb's Gate Kindergarten | 28 | $48,968 | 53.1 | $1,749 | 47.6 |
| Laton School - ACCEL | 54 | $41,373 | (20.9) | $766 | (29.7) |
| Lauren's Institute for Education | 2 | $4,680 | NA | $2,340 | NA |
| Legacy Classical Christian Academy | 40 | $60,786 | 106.6 | $1,520 | (1.8) |
| Lestonnac Kindergarten | 12 | $12,091 | 17.8 | $1,008 | (31.2) |
| Life Development Institute | 2 | $23,000 | 130.0 | $11,500 | 130.0 |
| Light and Life Elementary School | 1 | $347 | NA | $347 | NA |
| Lighthouse Academy | 5 | $5,121 | (27.3) | $1,024 | (23.2) |
| Loretto School | 47 | $63,615 | (32.2) | $1,354 | 9.8 |
| Lourdes Catholic School | 33 | $111,306 | 31.6 | $3,373 | 31.6 |
| Maranatha Christian Academy | 3 | $2,635 | 129.1 | $878 | 52.7 |
| Maricopa Village Christian School | 10 | $5,700 | (15.0) | $570 | (40.5) |
| Martin Luther School | 81 | $143,595 | (13.1) | $1,773 | 8.6 |
| Mesa Montessori | 6 | $5,670 | 21.2 | $945 | 41.3 |
| Millennium Worldwide Academy | 14 | $42,400 | 122.9 | $3,029 | 11.4 |
| Mission Christian School | 81 | $137,135 | 63.6 | $1,693 | 24.7 |
| Mission Montessori School | 30 | $26,220 | 8.9 | $874 | 52.5 |
| Montessori Center School | 11 | $54,403 | 13.0 | $4,946 | 84.9 |
| Montessori Centre - Main | 22 | $20,610 | 5.2 | $937 | (24.2) |
| Montessori Centre - North | 18 | $18,500 | 40.8 | $1,028 | (8.1) |
| Montessori Children House | 9 | $36,600 | 22.0 | $4,067 | 116.9 |
| Montessori Christian Academy | 6 | $16,559 | 224.3 | $2,760 | 62.2 |
| Montessori Day School | 27 | $19,000 | (20.8) | $704 | (39.5) |
| Montessori in the Park | 20 | $19,530 | 8.5 | $977 | 8.5 |
| Montessori International | 30 | $79,640 | (24.9) | $2,655 | (2.4) |
| Montessori Kingdom of Learning | 48 | $92,116 | (12.3) | $1,919 | 7.7 |
| Montessori Learning Center | 3 | $3,325 | (59.5) | $1,108 | 11.7 |
| Montessori West Preparatory School | 13 | $26,310 | (6.4) | $2,024 | 7.9 |
| Morning Glory Montessori | 3 | $8,170 | 760.0 | $2,723 | 473.3 |
| Most Holy Trinity Catholic School | 99 | $200,548 | 16.0 | $2,026 | 76.8 |
| Mount Calvary Lutheran School | 42 | $47,384 | 8.8 | $1,128 | (3.6) |
| Mountain Christian School | 52 | $117,353 | 88.6 | $2,257 | 12.5 |
| Mountain View Lutheran School | 4 | $4,320 | (81.9) | $1,080 | (27.6) |
| Navajo Lutheran Mission School | 81 | $258,486 | 44.5 | $3,191 | 1.7 |
| Nehemiah Ministries | 2 | $1,564 | 112.5 | $782 | 112.5 |
| Nellie P. Covert School | 21 | $45,114 | 31.3 | $2,148 | 6.3 |
| Neurological Music Therapy Services | 2 | $5,152 | NA | $2,576 | NA |
| New Covenant Child Development | 1 | $4,299 | (7.1) | $4,900 | 39.5 |
| New Horizons Academy | 9 | $32,418 | 113.3 | $3,602 | 42.2 |
| New Vistas Academy | 17 | $48,803 | 175.8 | $2,871 | 30.0 |
| New Way Learning Academy | 20 | $204,161 | (0.3) | $10,208 | (5.4) |
| Noah's Ark Kindergarten | 14 | $22,301 | 21.1 | $1,593 | (15.3) |
| North Phoenix Baptist Kindergarten | 12 | $13,622 | $25.4 | $1,135 | (22.9) |
| North Phoenix Christian Montessori | 1 | $4,500 | NA | $4,500 | NA |
| Northminster Christian School | 15 | $17,311 | 15.9 | $1,154 | 0.4 |
| Northwest Christian School (Peoria) | 3 | $1,450 | NA | $483 | NA |
| Northwest Christian School | 1,074 | $1,665,318 | 9.1 | $1,551 | 0.9 |
| Notre Dame Preparatory High School | 194 | $620,858 | 58.5 | $3,200 | 25.8 |
| Orme School | 28 | $139,045 | (1.7) | $4,966 | (1.7) |
| Our Lady of Joy School | 34 | $49,748 | NA | $1,463 | NA |
| Our Lady of Mount Carmel School | 236 | $394,942 | 8.7 | $1,673 | (4.7) |
| Our Lady of Perpetual Help School (Glendale) | 260 | $471,314 | 21.4 | $1,813 | 8.4 |

## APPENDIX IV

## NUMBER AND AMOUNT OF SCHOLARSHIPS RECEIVED BY SCHOOL

| School | # of Scholarships | Scholarship $ | % chg from 2007 | Avg. Scholarship | % chg from 2007 |
|---|---|---|---|---|---|
| Our Lady of Perpetual Help School (Scottsdale) | 369 | $410,504 | 22.5 | $1,112 | 28.4 |
| Our Lady of Sorrows Academy | 39 | $44,150 | 8.0 | $1,132 | (3.1) |
| Our Lady of the Mountains | 122 | $167,380 | (10.5) | $1,372 | (20.0) |
| Our Mother of Sorrows | 183 | $229,684 | 25.3 | $1,255 | (11.0) |
| Our Savior Lutheran School (Bylas) | 58 | $19,694 | 123.8 | $340 | 78.0 |
| Our Savior Lutheran School (Lake Havasu) | 24 | $46,548 | 42.8 | $1,940 | (20.6) |
| Page Christian School | 4 | $9,113 | 51.7 | $2,278 | 169.5 |
| Palms Elementary | 20 | $13,920 | 258.8 | $1,392 | 43.5 |
| Paradise for Tots Christian Kindergarten | 2 | $2,666 | (42.9) | $2,666 | 71.2 |
| Paradise Valley Christian | 323 | $511,669 | 14.2 | $1,804 | 6.8 |
| Pardes Jewish Day School | 124 | $605,111 | 29.8 | $4,880 | 5.7 |
| Parker Apostolic Christian School | 4 | $5,850 | 97.4 | $1,463 | (1.2) |
| Parkway Children's School of Excellence | 2 | $10,682 | 14.6 | $5,341 | 71.8 |
| Payson Community Christian School | 92 | $255,134 | 22.0 | $1,886 | (24.4) |
| Pentecostal of Phoenix Christian Academy | 4 | $2,614 | (90.2) | $653 | (28.2) |
| Perdot Lutheran School | 1 | $1,750 | (66.8) | $1,750 | 269.2 |
| Phillips Christian School | 1 | $4,050 | (25.0) | $519 | (38.2) |
| Phoenix Christian Academy | 7 | $22,324 | 181 | $1,475 | 18.1 |
| Phoenix Christian Elementary | 5 | $4,500 | 33.3 | $900 | (22.0) |
| Phoenix Christian School K-8 | 79 | $153,645 | 12.6 | $1,945 | (11.8) |
| Phoenix Christian United | 377 | $839,251 | 3.0 | $2,223 | 12.6 |
| Phoenix Christian Unified Elementary (Goodyear) | 65 | $102,030 | (11.5) | $1,570 | 7.5 |
| Phoenix Country Day School | 43 | $256,006 | (0.5) | $5,288 | (9.8) |
| Phoenix Hebrew Academy | 148 | $788,560 | 5.4 | $5,328 | 4.7 |
| Phoenix Metro Islamic School | 174 | $460,112 | 6.1 | $2,644 | (12.2) |
| Pilgrim Lutheran School | 54 | $63,383 | (0.3) | $1,185 | 13.0 |
| Pleasantview Christian Elementary | 1 | $1,688 | 0.0 | $1,688 | 0.0 |
| Pope John XXIII Catholic School | 143 | $258,300 | (3.8) | $1,806 | 6.1 |
| Precious Lamb Christian School | 15 | $28,473 | 97.5 | $1,898 | 186.3 |
| Prescott Adventist School | 15 | $6,041 | 25.6 | $403 | (32.6) |
| Primavera School | 26 | $75,425 | (4.9) | $2,901 | 31.7 |
| Primrose School of Fletcher Heights | | $450 | NA | $450 | NA |
| Providence Classical School | 53 | $104,586 | (3.7) | $1,858 | 1.4 |
| Pusch Ridge Christian Academy | 444 | $956,973 | 13.6 | $2,149 | 0.2 |
| Queen of Peace School | 72 | $135,250 | 20.9 | $1,878 | 7.5 |
| Rancho Solano (Gilbert) | 3 | $20,825 | 464.7 | $4,275 | 5.9 |
| Rancho Solano (Glendale) | 4 | $5,285 | (47.3) | $1,321 | (47.3) |
| Rancho Solano (Scottsdale) | 143 | $303,353 | 764.7 | $2,121 | 20.9 |
| Red Mountain Montessori | 3 | $4,765 | 40.2 | $1,588 | (8.6) |
| Red Rock Christian School | 22 | $12,830 | (24.7) | $583 | (25.1) |
| Redeemer Christian Academy | 10 | $13,817 | (44.7) | $1,382 | (33.7) |
| Redeemer Christian School | 58 | $89,611 | (0.8) | $1,518 | (4.2) |
| Redeemer Lutheran School | 103 | $182,405 | (10.8) | $1,771 | (4.4) |
| Resurrection Lutheran Child Development Center | 15 | $60,513 | (8.4) | $4,034 | (2.9) |
| Risen Savior Lutheran School | 54 | $76,528 | (60.5) | $1,417 | (47.3) |
| Rising Sun Montessori | 1 | $1,615 | NA | $1,615 | NA |
| River of Life Christian Academy | 43 | $40,628 | (2.3) | $931 | 4.5 |
| Sacred Heart School (Yuma) | 211 | $43,310 | 7.5 | $205 | (1.4) |
| Sacred Heart School (Prescott) | 128 | $418,072 | 20.8 | $3,871 | 54.3 |
| Safford Adventist Christian School | 8 | $5,100 | (68.9) | $637 | (54.5) |
| Safford Christian School | 23 | $31,309 | (4.1) | $1,361 | 4.2 |

## APPENDIX IV
## NUMBER AND AMOUNT OF SCHOLARSHIPS RECEIVED BY SCHOOL

| School | # of Scholarships | Scholarship $ | % chg from 2007 | Avg. Scholarship | % chg from 2007 |
|---|---|---|---|---|---|
| Saguaro Hills Adventist Christian School | 47 | $30,093 | (25.4) | $640 | 31.7 |
| Saguaro Hills Christian School | 36 | $40,890 | (2.8) | $1,136 | 2.6 |
| Sahuanta Christian Academy | 37 | $68,657 | 120.8 | $1,856 | 31.4 |
| Salpointe Catholic High School | 484 | $1,173,240 | 19.5 | $2,424 | (1.1) |
| San Francisco de Asis | 177 | $251,340 | 23.7 | $1,420 | 12.8 |
| San Miguel Catholic High School | 95 | $220,371 | 9.2 | $2,320 | 18.2 |
| San Xavier Indian School | 90 | $270,386 | 4.0 | $3,004 | 82.5 |
| Santa Cruz Catholic School | 89 | $166,967 | (6.8) | $1,876 | 15.2 |
| Seton | 36 | $65,500 | 21.2 | $1,819 | 31.2 |
| Scottsdale Christian Academy | 559 | $1,080,131 | 0.3 | $1,932 | (0.7) |
| Scottsdale United Methodist Kindergarten | 2 | $3,200 | 85.5 | $1,600 | 216.8 |
| Seton Catholic High School | 274 | $632,550 | 36.5 | $2,309 | 8.1 |
| Shalom Montessori School | 7 | $22,650 | NA | $3,236 | NA |
| Shearim Torah High School | 6 | $46,325 | NA | $7,721 | NA |
| Sheila's Christian Academy | 2 | $5,980 | NA | $2,990 | NA |
| Shepherd of the Desert Lutheran School | 72 | $97,910 | 14.1 | $1,360 | (14.4) |
| Shiloh Christian School | 40 | $42,798 | (8.1) | $1,070 | (22.3) |
| Sonshine Christian School | 4 | $1,590 | 19.1 | $1,147 | 19.0 |
| Southwest Christian School | 41 | $60,987 | 55.1 | $1,487 | (3.7) |
| Southwest Indian School | 1 | $230 | NA | $230 | NA |
| Southwestern Christian School | 145 | $223,221 | 3.4 | $1,533 | 15.5 |
| Spectrum Private School | 3 | $3,870 | NA | $1,290 | NA |
| Spirit of Hope Montessori School | 10 | $27,267 | 115.8 | $2,727 | 75.0 |
| SS Peter & Paul Catholic School | 200 | $277,532 | 17.3 | $1,388 | 12.0 |
| SS Simon & Jude Catholic School | 279 | $509,860 | 29.1 | $1,827 | 11.4 |
| St Agnes Catholic School | 143 | $257,255 | (5.9) | $1,799 | 2.0 |
| St Alban's Kindergarten | 1 | $3,500 | NA | $3,500 | NA |
| St Ambrose Catholic School | 293 | $195,193 | 8.5 | $666 | (15.3) |
| St Andrews Presbyterian Pre School & Kindergarten | 32 | $66,111 | 0.5 | $2,066 | 126.3 |
| St Anne's Little Flower Montessori School | 11 | $45,150 | (66.1) | $4,105 | 69.3 |
| St Anthony of Padua School | 92 | $148,410 | (0.8) | $1,613 | (10.3) |
| St. Anthony (Pinetop) | 42 | $101,620 | 3.2 | $2,420 | (28.7) |
| St Augustine High School | 111 | $236,708 | 18.3 | $2,133 | (13.6) |
| St Catherine of Siena School | 155 | $379,190 | 9.1 | $2,446 | 12.7 |
| St Charles Apache School | 101 | $284,764 | 6.8 | $2,819 | 14.2 |
| St Cyril's Catholic School | 148 | $311,682 | 4.6 | $2,106 | (18.8) |
| St Daniel the Prophet School | 102 | $166,633 | (9.9) | $1,634 | (20.5) |
| St Elizabeth Ann Seton | 236 | $306,007 | 19.6 | $1,297 | (37.2) |
| St Francis of Assisi School | 73 | $80,050 | (22.6) | $1,097 | (15.2) |
| St Francis Xavier Elementary School | 372 | $437,606 | 11.6 | $1,176 | 3.8 |
| St Gregory Catholic School | 232 | $392,856 | 20.1 | $1,693 | 2.5 |
| St Gregory College Prep | 102 | $458,816 | 5.9 | $4,489 | (27.4) |
| St James Kindergarten | 9 | $14,983 | (1.3) | $1,665 | 3.0 |
| St Jerome K-8 School | 130 | $218,919 | 12.3 | $1,684 | (9.8) |
| St John Bosco School | 361 | $382,359 | 9.0 | $1,059 | 9.1 |
| St John the Evangelist | 169 | $273,392 | (9.2) | $1,617 | (2.4) |
| St John Vianney Catholic School | 204 | $361,890 | (7.8) | $1,775 | (3.5) |
| St Joseph's Catholic School | 374 | $217,901 | 20.1 | $583 | 23.0 |
| St Joseph Montessori | 44 | $136,782 | 17.8 | $3,109 | 17.8 |
| St Louis the King School | 229 | $340,845 | 17.7 | $1,488 | (4.9) |
| St Luke's (Prescott) | 13 | $44,842 | 78.5 | $3,449 | 9.8 |
| St Maria Goretti Kindergarten | 16 | $72,010 | (1.4) | $4,001 | 31.3 |
| St. Mark's Methodist | 11 | $19,926 | 1.7 | $1,811 | 1.6 |

## APPENDIX IV

## NUMBER AND AMOUNT OF SCHOLARSHIPS RECEIVED BY SCHOOL

| School | # of Scholarships | Scholarship $ | % chg from 2007 | Avg. Scholarship | % chg from 2007 |
|---|---|---|---|---|---|
| St. Mark's Presbyterian Kindergarten | 3 | $10,500 | 7.7 | $3,500 | 79.8 |
| St. Mary-Basha Catholic School | 341 | $446,639 | 7.7 | $1,310 | (1.8) |
| St Mary's High School | 618 | $1,550,910 | 8.8 | $2,510 | 1.6 |
| St Matthew School | 80 | $223,162 | (9.9) | $2,790 | 22.8 |
| St Maximilian Mary Kolbe School | 40 | $80,376 | 96.1 | $2,009 | 7.8 |
| St Michael's Indian School | 176 | $222,021 | (4.1) | $1,261 | 138.4 |
| St Michael's Parish Day School | 174 | $495,020 | 38.9 | $2,845 | 4.8 |
| St Paul's Preparatory Academy | 52 | $183,769 | (2.7) | $3,534 | (47.6) |
| St Peter Mission School | 202 | $199,849 | (5.0) | $989 | (9.8) |
| St Peter's Montessori | 18 | $18,360 | (24.2) | $1,020 | 9.6 |
| St Therese Catholic School | 334 | $349,887 | 8.2 | $1,048 | (15.1) |
| St Thomas Aquinas | 226 | $373,033 | 5.4 | $1,651 | (9.1) |
| St Thomas Lutheran School | 18 | $42,733 | 71.4 | $2,374 | 61.8 |
| St Thomas the Apostle School | 394 | $367,061 | 0.7 | $932 | (9.3) |
| St Timothy's Catholic Academy | 179 | $278,398 | (1.5) | $1,555 | (4.1) |
| St Vincent de Paul School | 202 | $320,828 | 8.8 | $1,588 | 9.4 |
| Summit School of Anwatukee | 77 | $244,155 | 0.9 | $3,171 | 11.4 |
| Sun & Shield Christian Academy | 79 | $66,456 | 26.1 | $841 | (2.7) |
| Sun Valley Indian School | 12 | $15,877 | (33.5) | $1,323 | (33.5) |
| Sunrise Montessori School | 20 | $45,405 | 0.4 | $2,270 | 7.4 |
| Surrey Garden Christian School | 385 | $806,631 | 12.8 | $2,095 | 0.3 |
| Tanque Verde Lutheran Kindergarten | 24 | $62,855 | 11.8 | $2,619 | 11.8 |
| Tatum Ranchette Montessori | 11 | $22,135 | NA | $1,581 | NA |
| Tempe Advent st Christian School | 12 | $5,788 | (73.8) | $482 | (21.9) |
| Tempe Montessori School | 35 | $77,677 | (16.0) | $2,219 | (26.0) |
| Tesseract School | 17 | $56,103 | (34.5) | $3,300 | (26.8) |
| The Caepe School | 6 | $5,490 | NA | $915 | NA |
| The Family School | 35 | $129,607 | 25.2 | $3,703 | 32.4 |
| The Learning Pod | 5 | $8,405 | 238.2 | $1,681 | (32.4) |
| Thunderbird Advent st Academy | 209 | $172,253 | (3.6) | $824 | 25.2 |
| Thunderbird Christian Elementary | 88 | $58,023 | NA | $592 | NA |
| Tree of Life Christian School | 6 | $3,453 | NA | $575 | NA |
| Tri-City Christian Academy | 184 | $283,588 | (9.9) | $1,541 | 2.5 |
| Trinity Christian School (Chino Valley) | 141 | $221,188 | 2.2 | $1,569 | 16.0 |
| Trinity Christian School (Mesa) | 20 | $24,309 | 191.1 | $1,215 | 16.4 |
| Trinity Kindergarten | 9 | $15,714 | (44.5) | $1,746 | 4.9 |
| Trinity Lutheran | 202 | $273,232 | 3.2 | $1,352 | (11.6) |
| Trinity United Methodist Kindergarten | 13 | $29,171 | 186.3 | $2,244 | 10.1 |
| Tucson Community School | 28 | $39,255 | (12.1) | $1,402 | 9.6 |
| Tucson Hebrew Academy | 99 | $559,655 | 27.4 | $5,653 | 13.2 |
| Tucson Waldorf School | 13 | $32,731 | 74.4 | $2,518 | 34.2 |
| Turning Point | 31 | $81,838 | 24.4 | $2,640 | 24.4 |
| Valley Baptist School | 7 | $4,797 | NA | $685 | NA |
| Valley Christian High School | 348 | $1,193,860 | 12.2 | $3,431 | 6.4 |
| Valley Classical Christian School | 96 | $160,651 | (26.7) | $1,673 | (9.8) |
| Valley Lutheran High School | 169 | $265,025 | (1.6) | $1,568 | (15.6) |
| Verde Valley Adventist School | 52 | $10,422 | 57.9 | $200 | (72.7) |
| Verde Valley Christian School (Cottonwood) | 110 | $147,206 | 1.7 | $1,338 | (4.9) |
| Verde Valley School (Sedona) | 20 | $74,955 | 44 | $3,748 | 22.6 |
| Veritas Christian Community School | 75 | $145,741 | 29.2 | $1,943 | 13.7 |
| Vide de Marie Academy | 98 | $117,145 | 1.3 | $1,195 | (21.5) |
| Vision Christian Academy | 19 | $18,795 | 301.6 | $989 | 25.8 |
| Weekday School | 1 | $6,300 | 25.5 | $6,300 | 25.5 |
| West Valley Adventist School | 38 | $13,730 | 49.9 | $361 | (5.5) |
| White Mountain Montessori | 9 | $9,410 | 3.1 | $1,046 | 6.6 |



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## APPENDIX IV
## NUMBER AND AMOUNT OF SCHOLARSHIPS RECEIVED BY SCHOOL

| School | # of Scholarships | Scholarship $ | % chg from 2007 | Avg. Scholarship | % chg from 2007 |
|---|---|---|---|---|---|
| Wickenburg Christian Academy | 47 | $64,397 | 6.0 | $1,370 | 17.3 |
| Wings on Words | 1 | $900 | NA | $900 | NA |
| Word of Life Early Learning Center | 5 | $7,225 | (28.6) | $1,445 | (51.1) |
| Xavier College Prepa atory High | 329 | $951,823 | 30.0 | $2,893 | (3.0) |
| Yuma Advent st School | 22 | $13,100 | 43.7 | $595 | (8.6) |
| Yuma Catholic High School | 213 | $403,416 | 38.9 | $1,894 | 12.8 |
| Yuma Lutheran High School | 216 | $251,306 | (1.5) | $1,163 | (2.0) |

# APPENDIX V
## SCHOLARSHIPS BY LOCATION OF PRIVATE SCHOOL

| City/Town | # | $ | % chg from 2007 | Avg. Scholarship | % chg from 2007 | Rank 2008 | Rank 2007 |
|---|---|---|---|---|---|---|---|
| Anthem | 84 | $134,980 | 45.4 | $1,607 | (16.9) | 30 | 18 |
| Apache Junction | 6 | $5,700 | (77.0) | $950 | (34.8) | 53 | 34 |
| Arizona City | 3 | $4,065 | 171.0 | $1,355 | 171.0 | 40 | 59 |
| Avondale | 226 | $373,033 | 5.4 | $1,651 | (8.1) | 27 | 20 |
| Bapchule | 202 | $199,849 | (5.0) | $989 | (9.8) | 51 | 46 |
| Benson | 5 | $4,000 | (31.2) | $800 | (17.5) | 58 | 47 |
| Buckeye | 75 | $82,222 | 33.6 | $1,096 | (18.1) | 50 | 39 |
| Bylas | 58 | $19,694 | 123.6 | $340 | 78.0 | 64 | 62 |
| Camp Verde | 126 | $110,501 | 17.0 | $877 | 25.3 | 56 | 55 |
| Carefree | 34 | $49,748 | NA | $1,463 | NA | 32 | --- |
| Casa Grande | 92 | $148,410 | (0.8) | $1,613 | (12.5) | 29 | 21 |
| Cave Creek | 67 | $95,614 | 34.0 | $1,427 | (12.0) | 33 | 28 |
| Chandler | 1,324 | $2,932,353 | 11.0 | $2,215 | (1.3) | 11 | 8 |
| Chino Valley | 141 | $221,189 | 2.2 | $1,569 | 16.0 | 31 | 38 |
| Clarkdale | 2 | $900 | NA | $450 | NA | 63 | --- |
| Cottonwood | 220 | $313,706 | 10.4 | $1,426 | (13.7) | 34 | 27 |
| Douglas | 59 | $85,706 | (27.2) | $1,453 | 2.5 | 42 | 43 |
| Flagstaff | 247 | $446,514 | 19.5 | $1,808 | 19.0 | 22 | 32 |
| Florence | 3 | $1,380 | 50.0 | $460 | (50.0) | 62 | 50 |
| Fort Mohave | 14 | $16,410 | 187.7 | $1,172 | 23.2 | 49 | 49 |
| Gilbert | 762 | $1,524,344 | (2.2) | $2,000 | (0.6) | 14 | 12 |
| Glendale | 1,218 | $2,083,889 | 16.0 | $1,711 | (0.1) | 24 | 25 |
| Globe | 64 | $120,392 | (9.1) | $1,881 | (10.5) | 18 | 11 |
| Goodyear | 308 | $516,447 | 2.8 | $1,677 | 0.8 | 26 | 26 |
| Higley | 13 | $16,622 | NA | $1,279 | NA | 44 | --- |
| Holbrook | 82 | $18,782 | 21.4 | $229 | (8.0) | 65 | 61 |
| Kingman | 51 | $45,255 | (11.8) | $887 | 55.6 | 55 | 56 |
| Kykotsmovi-Lake Havasu City | 80 | $186,730 | 5.4 | $2,334 | 17.2 | 8 | 15 |
| Laveen | 185 | $344,891 | 18.5 | $1,864 | 5.0 | 19 | 22 |
| Litchfield Park | 10 | $5,700 | (15.0) | $570 | (40.5) | 60 | 48 |
| Marana | 291 | $351,059 | 2.0 | $1,206 | (9.5) | 46 | 41 |
| Maricopa | 79 | $66,456 | 26.1 | $841 | (2.7) | 57 | 52 |
| Mayer | 3 | $3,600 | NA | $1,200 | NA | 47 | |
| Mesa | 28 | $139,045 | (3.2) | $4,966 | (1.2) | 1 | 2 |
| Nogales | 985 | $1,346,650 | (8.9) | $1,367 | (2.8) | 39 | 36 |
| Oro Valley[15] | 248 | $159,215 | 23.7 | $642 | 14.6 | 59 | 57 |
| Page | 18 | $64,383 | (1.8) | $3,577 | (18.1) | 4 | 6 |
| Paradise Valley | 4 | $9,113 | 51.7 | $2,278 | 165.5 | 10 | 53 |
| Parker | 63 | $231,159 | (53.2) | $3,669 | (29.4) | 3 | 1 |
| Payson | 10 | $9,300 | 233.9 | $930 | (37.2) | 54 | 33 |
| Peoria | 92 | $155,134 | 22.0 | $1,686 | (24.4) | 25 | 9 |
| Peridot | 100 | $181,748 | 6.7 | $1,817 | 5.6 | 21 | 24 |
| Phoenix | 1 | $1,750 | (86.8) | $1,750 | 269.2 | 23 | 60 |
| Pinetop-Lakeside | 9,066 | $19,419,879 | 24.0 | $2,142 | 2.4 | 13 | 14 |
| Prescott | 81 | $111,030 | (0.9) | $2,133 | 30.2 | 12 | 5 |
| Queen Creek | 303 | $723,111 | 13.8 | $2,387 | 13.3 | 7 | 10 |
| Rock Point | 108 | $138,304 | 57.6 | $1,281 | (2.2) | 43 | 42 |
| Safford | 81 | $258,486 | 44.5 | $3,191 | 1.7 | 5 | 3 |
| Sahuarita | 31 | $36,409 | (24.2) | $1,174 | (12.1) | 48 | 40 |
| San Carlos | 37 | $68,657 | 120.8 | $1,856 | 31.4 | 20 | 35 |
| Scottsdale | 109 | $292,947 | 5.2 | $2,688 | 16.8 | 6 | 7 |
| | 1,677 | $3,247,229 | 26.0 | $1,936 | 25.5 | 16 | 31 |

[15] Pusch Ridge Christian School was previously mistakenly put into Oro Valley. It should have been in Tucson.

## APPENDIX V
## SCHOLARSHIPS BY LOCATION OF PRIVATE SCHOOL

| City/Town | # | $ | % chg from 2007 | Avg. Scholarship | % chg from 2007 | Rank 2008 | Rank 2007 |
|---|---|---|---|---|---|---|---|
| Sedona | 20 | $74,955 | 44.1 | $3,748 | 22.5 | 2 | 4 |
| Show Low | 119 | $271,195 | 76.7 | $2,279 | 42.5 | 9 | 29 |
| Sierra Vista | 304 | $431,565 | 0.0 | $1,420 | (10.5) | 35 | 30 |
| Sonoita | 9 | $14,795 | 53.2 | $1,644 | 19.2 | 28 | 37 |
| St. Michael | 176 | $222,021 | (4.1) | $1,261 | 138.4 | 45 | 58 |
| Sun Valley | 12 | $15,877 | (33.5) | $1,323 | (33.4) | 41 | 16 |
| Surprise | 15 | $21,145 | 65.8 | $1,410 | (27.6) | 36 | 19 |
| Tempe | 1,490 | $2,960,872 | 6.6 | $1,987 | 2.8 | 15 | 17 |
| Tucson | 6,137 | $11,700,809 | 20.6 | $1,907 | 8.8 | 17 | 23 |
| Winkelman | 85 | $46,220 | (10.3) | $544 | (27.2) | 61 | 54 |
| Wickenburg | 47 | $64,397 | 6.0 | $1,370 | 17.3 | 38 | 45 |
| Willcox | 34 | $33,078 | (17.5) | $973 | 9.2 | 52 | 51 |
| Yuma | 792 | $1,097,594 | 9.6 | $1,380 | 9.9 | 37 | 44 |

(3) (5) (4)

Nos. 09-987, 09-988, 09-991

FILED
APR 23 2010
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, et al.,
*Petitioners,*

—v.—

KATHLEEN M. WINN, et al.,
*Respondents.*

ARIZONA SCHOOL CHOICE TRUST, et al.,
*Petitioners,*

—v.—

KATHLEEN M. WINN, et al.,
*Respondents.*

GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue,
*Petitioner,*

—v.—

KATHLEEN M. WINN, et al.,
*Respondents.*

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the complaint in this case, which alleges pervasive religious discrimination in awarding scholarships in Arizona's unusual tax-credit school-voucher program, states a claim upon which relief can be granted.

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## STATEMENT OF THE CASE

### Introduction

We emphasize at the outset that Arizona's program is quite unlike tax-credit or school voucher programs in other states, and also unlike the program upheld by the Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the case on which petitioners and their *amici* principally rely. Unlike those programs, the Arizona program uses religious organizations to award most of its scholarships, and it permits those organizations to require that parents enroll their children at religious schools in order to receive state scholarship aid. That pervasive religious discrimination in the way scholarships are awarded - - a feature unique to the Arizona program - - is the basis of respondents' case.

In *Zelman*, the state issued tuition vouchers to parents of children living in a public school district whose schools had been "among the worst performing . . . in the Nation." 536 U.S. at 644. The vouchers were issued on the basis of financial need. The purpose of the *Zelman* program was to give children from low-income families the chance to escape a failed public-school system. The program was upheld because it served this important secular purpose, because it was, in design and operation, "entirely neutral with respect to religion," and because it gave parents receiving vouchers the unfettered right to choose the school at which to use the voucher. 536 U.S. at 649-650, 653, 662.

The Arizona program is different in every one of these respects. If the allegations in respondents' complaint are taken as true, as they must be at this stage of the case, the Arizona program is neither based on financial or academic need nor neutral with respect to religion. Instead, it awards most of its scholarships to the children of middle-class and wealthy parents on the *basis* of religion. Most parents who receive Arizona program scholarships, moreover, have no choice about where to use them, because most scholarships can only be used at specific religious schools. We are aware of no program in any other state that contains these unconstitutional features.

The court of appeals has held that respondents' factual allegations state a claim under the Establishment Clause, and that respondents should be given an opportunity to prove the truth of their allegations. No temporary or preliminary injunctive relief has been requested or given. This completely unexceptionable decision does not conflict with the decision of any other federal court of appeals or with the decision of any state supreme court. Because it is based on features unique to the Arizona program, the decision below does not call into question the constitutionality of programs in other states. The decision is, in addition, clearly correct. The petitions for certiorari should be denied.

## The Arizona Program

Tax-related school-choice programs ordinarily permit *parents* to claim tax credits or tax deductions for their own educational expenses on behalf of their children - - expenses such as tuition, the cost of books

and supplies, and transportation costs. Programs of that kind offer all parents who send their children to non-public schools the opportunity to defray some of those educational expenses.

Arizona's tax-credit program is completely different. Arizona tax credits do not permit parents with children in non-public schools to defray some or all of their costs for private education. Parents with children in religious or private schools are actually *forbidden* by the Arizona statute to claim tax-credits for their own educational expenses. Ariz. Rev. Stat. Ann. (A.R.S.) § 43-1089(E). (The text of § 1089 is reproduced on pages 112a-115a of the Petition in 09-987.) The parents who benefit from Arizona's program are those relatively few who are fortunate enough to be chosen to receive scholarships by one of Arizona's "school tuition organizations" (STOs) - - non-governmental organizations that the state has authorized to award the program's scholarships on the state's behalf.

Arizona scholarships are funded through a system of state income-tax credits that are given for "contributions" that taxpayers make to STOs. These credits can be used by *any* Arizona individual income-tax payer, regardless of whether the taxpayer is a parent with children in school or has any educational expenses whatsoever. A.R.S. § 43-1089(A). The Arizona credits are not tax deductions that require the taxpayer to make a contribution of his or her own funds for a charitable purpose. They are dollar-for-dollar tax credits that taxpayers can use to satisfy up to $500 or $1,000 (depending upon whether single or married) of their annual state individual-income-tax

liability. *Id.* The credits cost the taxpayers who use them nothing; the cost of the credits is borne entirely by the state's general fund. The Arizona program is therefore not a program of private taxpayer charity. It is a program that uses state revenues for a state purpose, at no cost to the taxpayers whose use of the credits finances the program.

The Arizona school tuition organizations that receive tax-credited payments from taxpayers are required by statute to use them to award scholarships that are usable only at non-public schools. A.R.S. § 43-1089(G)(2-3). STOs are private organizations, now about 50 in number, that have been established, pursuant to the Arizona program, for the purpose of making scholarship awards from the tax revenues that they receive directly from taxpayers on the state's behalf. *Id.* The STOs that award most of Arizona's scholarships are religious organizations. See Petition in 09-988 at App. 221-App. 222.

Having chosen to use non-governmental organizations, rather than a state agency, to award scholarships from state funds on its behalf, the Arizona Legislature might have been expected to establish scholarship standards that would further its purported educational purposes - - standards requiring that aid be given to children from low-income families, for example, or to children who are not being adequately served by the public school system. The Arizona program contains no such standards. Arizona STOs are free to - - and do - - award scholarships on any basis they choose. The result is that a majority of children who receive Arizona program scholarships are children of middle class or wealthy families - - children

who were already attending private or religious school when the state scholarship was first awarded to them. See Lucas, *The Arizona Scholarship Tax Credit*, Goldwater Institute Policy Report No. 186 (Dec. 11, 2003). (The Goldwater Institute has filed an *amicus* brief in support of the Petition in 09-988.)

Arizona STOs are not prohibited from awarding scholarships on the basis of religion or sex. These are discriminations in which the state would, of course, be forbidden to engage if it awarded the scholarships itself. The Arizona statute prohibits schools that scholarship students attend from discriminating "on the basis of race, color, handicap, familial status or national origin." A.R.S. § 43-1089(G)(2). That provision, however, was intentionally drafted so as not to prohibit the schools from discriminating on the basis of religion or sex in selecting students. The Arizona statute also permits the schools that scholarship students attend to require scholarship students participate in worship services, to take classes in religion, and to participate in all the other religious activities required of non-scholarship students.

Religious schools and organizations have aggressively and openly taken advantage of the Arizona program to further their religious educational goals. The web site of intervenor Arizona Christian School Tuition Organization (ACSTO), for example, describes ACSTO's goal as being "to further Christian education by effectively implementing the provisions of this law for the benefit of Christian school students and their families." ACSTO, acsto.org (last visited Apr. 20, 2010) The web site urges taxpayers "looking for new ways to support Christian education" to do so by

"taking advantage of Arizona's unique opportunity to receive a dollar-for-dollar credit against their Arizona state income tax." *Id.* The web site of the Jewish Tuition Organization (JTO), which has filed an *amicus* brief in support of the petitions in this case, explains that, "[w]ith Arizona's scholarship tax credit you can send children to our community's Jewish day schools and it won't cost you a dime![1] When you support the Jewish Tuition Organization, you receive a dollar-for-dollar tax credit up to $1,000 if you are married or $500 if you are single. Best of all, your donation provides [an] outstanding secular and Jewish education to children who would otherwise be unable to attend a Jewish day school." JTO, jewishphoenix.org (last visited Apr. 20, 2010). The Chabad Tuition Org. (CTO) web site asks taxpayers to "imagine giving Tzedakah [charity] with someone else's money. . . . Stop imagining, thanks to Arizona's laws you can!" CTO, chabadaz.com (last visited Apr. 20, 2010). The web sites and mailings of the other Arizona religious STOs contain identical or similar assertions that Arizona law has been designed to let parishioners and others pay for other people's children to attend religious schools at the state's expense.

STO scholarships must allow children "to attend any qualified school of their parents' choice." A.R.S. § 43-1089(G)(3). That language, on its face, would seem to prohibit religious STOs from awarding scholarships

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[1] Although telling taxpayers that "contributions" to JTO "won't cost you a dime," JTO's *amicus* brief nevertheless argues here that the decision below "erred in suggesting that '[a] tax-credit eligible contribution to an STO costs the taxpayer nothing.' " JTO brief, p. 12, n. 7.

that are usable only at religious schools. Section 43-1089(G)(3) also requires, however, that STOs "shall provide educational scholarships or tuition grants to students without limiting availability to only students of one school." Apparently relying on this additional language, the Arizona Department of Revenue has, from the outset of the program, allowed religious STOs to award scholarships that can only be used in religious schools. Religious STOs take full advantage of this permission.

Respondents filed their complaint in this case after data about the first calendar year of full operation of the Arizona program became available. That data showed that 94% of the tax-credited funds that year was contributed to religious STOs that awarded scholarships usable only at religious schools. See Respondents' Complaint, ¶ 15, Petition in 09-987 at 120a. The Arizona program has increased enormously in size since then, with a corresponding increase in scholarships usable only at religious schools. In 2008, the last year for which data was available at the time this brief was written, more than $55 million in tax credits was claimed for taxpayer payments to STOs. See Arizona Department of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2008*, Executive Summary.[2] Most of this money went to STOs that will use it toward scholarships that can only be used at religious schools.

The STO receiving and awarding the most tax-

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[2] *Available at* azdor.gov/portals/o/reports/private-school-tax-credit-report-2008.pdf.

credited funds in 2008 was intervenor ACSTO. It received more than $11.5 million and awarded almost $11 million in scholarships. *Id.* at 8. Those scholarships can be used only at Christian schools. The second largest STO recipient was the Catholic Tuition Organization of the Diocese of Phoenix. It received more than $9 million and awarded more than $10 million in scholarships. Those scholarships can only be used at Diocese schools. *Id.* These two religiously-affiliated STOs together received and awarded almost 40% of the Arizona program's scholarship funds in 2008. Other religiously affiliated STOs received and awarded at least an additional $15 million. Because the large majority of state scholarship funds is thus controlled by STOs that award scholarships usable only at religious schools, "parents choosing to send their children to non-religious, non-public schools may be unable to locate an STO willing to make a tuition grant to a student attending the non-religious school of the parents' choice." Complaint, ¶ 26, Petition in 09-987 124a.

Other aspects of the Arizona program reinforce both its lack of religious neutrality and its failure to serve the secular purposes for which it was supposedly enacted. The program, for example, permits taxpayers to designate students as scholarship recipients when they make "contributions" to STOs (so long as the designee is not the taxpayer's dependent). See A.R.S. § 43-1089(E). With STO cooperation, affluent taxpayers use this feature of the program to "swap" contributions so that the state will pay part of their children's religious-school tuition. Two sets of parents will each make a "contribution" to an STO and designate that

payment as tuition for the other parents' child. As a result, the state pays religious-school tuition for both children. Parents with children in religious school can similarly ask relatives and friends to make "contributions" to a religious STO and to designate those amounts for their child, so that the state pays part or all of their child's tuition. Complaint ¶¶ 27-28.

The failure of the Arizona program to serve its purported secular purposes is not a secret. Two newspapers - - the Arizona Republic, the state's largest newspaper, and the East Valley Tribune - - have each recently published a comprehensive series of investigative articles about the program's failing operation.[3] Here is a sample of what these investigative articles describe:

> • In operation, the Arizona program displays "lack of oversight, double-dipping into state funds, manipulating the system for personal and . . . financial gain, and failure to benefit the poor." Ronald J. Hansen & Pat Kossan, *The Tuition Tax Credit: Tuition aid Benefits Wealthy Families, Raises Worry*, Ariz. Republic, Aug. 1, 2009, azcentral.com.
>
> • The executive director of an STO that received more than $6 million in contributions in 2008 said that "about 70

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[3] The full series of Arizona Republic articles is available at azcentral.com, using the search phrase "the tuition tax credit.". The East Valley Tribune series can be found at www.eastvalleytribune.com/page/taxcredits.

percent of her scholarships in 2008 went to those who are not considered low-income and at least 9 percent [to] those who could be considered wealthy." Overall, her organization targets the middle class. "That's who we cater to . . . I would be very disappointed to see a (low-income) group as a target." *Id.*

• In a 2003 survey, the Goldwater Institute, a conservative think tank that has filed an amicus brief in this case and that has ties to intervenor Arizona School Choice Trust, found that "87 percent of the scholarship students helped by 18 school tuition organizations were already enrolled in private school before the aid." *Id.*

• Arizona tax credits have "largely failed to expand access to private education for low- and middle-income families, as lawmakers promised . . . [and] blatantly violate the few regulations that lawmakers included in the statute . . . ." Ryan Gabrielson, *School Tuition Organizations Unaccountable*, E. Valley Trib., Aug. 1, 2009. eastvalleytribune.com/story/142256.

• A majority of tax credit donations are "earmarked to give scholarships to students already enrolled in private

schools, no matter how much money their parents earn." Ryan Gabrielson & Michelle Reese, *Private School Credits Rife with Abuse*, E. Valley Trib., Aug. 2, 2009, *available at* 2009 WLNR 14919217.

- At two of the largest STOs, executives, one of whom is a member of the state legislature who has been the most prominent legislative proponent of the Arizona program, "have used tax credit donations to enrich themselves, buying luxury cars, real estate and funding their own outside for-profit businesses." *Id.*

- Some of the program's chief proponents agree that religious and other private schools "have used the infusion of millions of income tax dollars to increase tuition, rather than the diversity of their campuses." *Id.*

- Counsel of Record for amicus Goldwater Center, who was instrumental in establishing the Arizona program, has concluded that "This is horrible. . . This is not the program I fought for." *Id.*

After these articles were published, legislative task forces were established. See Ryan Gabrielson, *Lawmakers Call for School Tax Credit Probe*, E. Valley Trib., Aug. 11, 2009, www.eastvalleytribune.com/story/142824. No relevant

legislation had resulted at the time this brief was written. The "reform" proposal that seems to have the greatest chance of enactment at the current legislative session would remove the requirement that payments to STOs be made during the calendar year for which a credit is claimed, and permit taxpayers to wait to make those payments until they file their tax return for that year. See S.B. 1274, 49th Leg., 2d Reg. Sess., Senate Engrossed Version.

## The Decision Below

Respondents' district court complaint asked that the Director of the Arizona Department of Revenue be prohibited in the future from awarding tax credits for payments to STOs that award scholarships on the basis of religion, or that award scholarships usable only at religious schools. The Director moved to dismiss for lack of federal jurisdiction. The district court granted the motion. The court of appeals reversed, *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002), and this Court affirmed, *Hibbs v. Winn*, 542 U.S. 88 (2004).

On remand, the district court permitted intervention as defendants by Arizona Christian School Tuition Organization (ACSTO), the state's largest STO, and the Arizona School Choice Trust, a non-religious STO. All three defendants moved for dismissal on the ground that the complaint did not state a claim upon which relief could be granted. The district court again dismissed, *Winn v. Hibbs*, 361 F.Supp. 2d 117 (D.Ariz. 2005), and the court of appeals again reversed, *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002 (9th Cir. 2009). No temporary or

preliminary injunctive relief has been requested by respondents at any stage of the litigation, and none has been given.

Judge Fisher's opinion for the unanimous court of appeals panel holds that respondents' allegations that Arizona's tax-credit funded scholarship program "lacks religious neutrality and true private choice in making scholarships available to parents" are "sufficient to state a claim that Arizona's private school scholarship tax credit program, as applied, violates the Establishment Clause of the United States Constitution." Petition in 09-987, 3a. Respondents' allegations, if proved, could show that defendants' claim "that Section 1089 was enacted primarily to provide Arizona students with equal access to a wide range of schooling options" was "a pretense." *Id.* at 19-20a. In addition, "if plaintiffs' allegations are accepted as true, Section 1089 violates the Establishment Clause by delegating to taxpayers a choice that, from the perspective of the program's aid recipients, 'deliberately skew[s] incentives toward religious schools.' " *Id.* at 21a. Such a program would channel "a disproportionate amount of government aid to sectarian STOs, which in turn limit their scholarships to use at religious schools . . . requiring parents who would prefer a secular private school but who cannot obtain aid from the few available nonsectarian STOs to choose a religious school to obtain the perceived benefits of a private school education." *Id.* at 21a-22a. A reasonable observer could also "conclude that the aid reaching religious schools under this program 'carries with it the *imprimatur* of government endorsement.' " *Id.* at 22a. Rehearing *en banc* was denied, with eight

dissents. *Id.* at 62a.

## ARGUMENT

The decision below does not conflict with the decision of any other court of appeals or with the decision of the highest court of any state. It is a fact-specific interlocutory ruling that concerns the administration of an unusual Arizona program that uniquely combines a failure to serve a significant secular purpose with a lack of religious neutrality. If the Arizona program operates as respondents allege that it does, respondents contend that it would violate the Establishment Clause. The decision below holds that respondents should have an opportunity to prove the truth of their factual allegations. Preliminary injunctive relief has neither been requested nor issued, and the pendency of this litigation threatens no school-choice programs in other states. There is no occasion for the Court's review of this unexceptionable ruling.[4]

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[4] Petitioner ACSTO contends that respondents lack standing because Arizona's allegedly unconstitutional expenditure of tax revenues occurs before, rather than after, the revenues reach the state treasury. Petition in 09-987, 5-21. This odd contention has no merit. Taxpayer standing to challenge a state spending program as a violation of the Establishment Clause depends, not upon whether funds technically pass through the state treasury, but upon whether taxpayers have a "financial interest that is, or is threatened to be, injured by the unconstitutional conduct." *Doremus v. Bd. of Educ.*, 342 U.S. 428, 435 (1952). If petitioner's standing contention were correct, taxpayers would not have had standing to bring the Establishment Clause challenges that were adjudicated on the merits by this Court in *Mueller v. Allen*, 463 U.S. 388 (1983) (tax deductions), *Walz v. Tax Comm'n.*, 397 U.S. 664 (1970) (tax exemptions), or *Comm. for Public Educ. &*

## A. There is No Conflict.

Petitioners do not suggest the existence of a conflict between the decision below and the decision of any other federal court of appeals. Their contention is that the decision below conflicts with the decision of the Supreme Court of Arizona in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), *cert. denied*, 528 U.S. 921 (1999). That contention is incorrect.

*Kotterman* was a *facial* challenge to the Arizona program involved in this case. The *Kotterman* complaint was filed, and the case was decided, on the basis of the statutory text, before the program began full operation. The present case, by contrast, is an *as-applied* challenge, not to the statute's text, but to the program as it actually operates. The features of the program's operation that are the primary bases of respondents' challenge - - the award of scholarships that can be used only in religious schools by religious organizations, the effect of that religious discrimination on parental choice, and the failure of the program to achieve its purported secular objectives - - could not have been challenged in *Kotterman*. The *Kotterman* court actually appears to have expressly (and it turns out incorrectly) assumed that the Arizona program would be religiously neutral in operation. See *Kotterman*, 972 P.2d at 614: ("Every STO must allow its scholarship recipients to attend any qualified school of their parents' choice." )

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*Religious Liberty v. Nyquest*, 413 U.S. 756 (1973) (tax credits).

### B. Existing or Proposed School Voucher or Tax-Credit Programs in Other States Are Not Affected by the Decision Below.

Petitioners suggest that the decision below casts a "constitutional cloud" on school-choice programs in other states. See Petition in 09-991, 30-31; Petition in 09-988, 34-35. That "cloud" is imaginary. The programs in other states to which petitioners refer do not contain the religiously discriminatory practices that make the Arizona program unconstitutional.

In 2009, the United States Department of Education issued a Report on existing state voucher, tuition tax-credit and similar school-choice programs in the United States. See U.S. Dept. of Educ., *Education Options in the United States, State Programs that Provide Financial Assistance for Attendance at Private Elementary or Secondary Schools* (2009). The Report lists twenty-six such programs in fourteen states and the District of Columbia. Only five of these twenty-six programs - - those in Florida, Georgia, Iowa, Rhode Island and Pennsylvania - - use tax credit systems at all similar to the Arizona program. All but one of these five programs contain, as the Arizona program does not, provisions that prevent the award of scholarships on the basis of religion, that prevent the award of scholarships usable only at religious schools, that preserve parental free choice in the use of scholarships, and that ensure that the program serves a significant secular purpose.

Following are brief descriptions of the five programs in other states to which petitioners refer:

- The Florida Tax Credit Scholarship Program, Fla. Stat. Ann. § 220.187 (2009), provides scholarships for students who are in foster care, or for students with financial need who are not already attending private school. Florida employs three non-governmental STOs to award these scholarships. None is a religious organization. Florida's statute does not permit STOs to "restrict or reserve scholarships for use at a particular private school" and requires that STO scholarships allow a parent to transfer a scholarship during a school year "to any other eligible private school of the parent's choice." Although Florida has joined in an amicus brief supporting petitioners in this case, its program is clearly not called into question by the decision below, and the amicus brief does not suggest otherwise.

- Rhode Island's Business Entity Scholarship Tax Credit Program, R.I.Gen.Laws §§ 44-62-1; 44-62-2 (2009) provides scholarships only for students from low-income families. Only business entities may use the credits - - individual taxpayers may not. Taxpayers who take the tax credit may not designate funds for any student or any school. Rhode Island, like Florida, has three STOs, none of which is religiously affiliated. Rhode Island has not joined the amicus brief filed by eight states in support of the Petition in 09-991.

• The Iowa STO program, Iowa Code § 422.11S (2010), authorizes scholarships only for students from low-income families. Unlike Arizona taxpayers, Iowa taxpayers must contribute their own funds in order to be able to claim a credit. Iowa taxpayers also may not designate students as scholarship recipients and Iowa STO scholarships must allow students "to attend a qualified school of their parents' choice." Iowa has not joined the eight-state amicus brief.

• Pennsylvania's Educational Improvement Tax Credit Program, 24 Pa.Stat.Ann. 20-2001-B *et seq.*, awards scholarships only to students from low-income families. It includes grants for parental expenses in public as well as private-schools, and also includes direct grants to public schools for innovative educational programs. Pennsylvania has joined the amicus brief in support of the Petition in 09-991. That brief, however, does not explain how the Pennsylvania program would be endangered by the decision below.

• The only state program that closely resembles Arizona's in structure is a Georgia program adopted in 2008. Ga. Code, Ann. §§ 20-2A-1, 48-7-29.16 (2009). Data regarding the first year of the Georgia program's operation was not yet available when this brief was written. The Georgia statute, like Arizona's,

requires that STOs "allow students to attend any qualified school of their parents' choice." Georgia may, unlike Arizona, enforce this requirement. Georgia has not joined the eight-state amicus brief. Except for Pennsylvania, none of the states that have joined that brief has a school-choice program that could conceivably be jeopardized by the decision below.[5]

If the Arizona Legislature were interested in supporting non-public education through tax credits in a religiously neutral manner, nothing in the decision below would prevent it from doing so. Both Florida and Rhode Island have established religiously neutral

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[5] Petitioners also refer to a "cloud" over legislation that has been introduced in California, Montana, Nevada and Oregon. None of those proposals resembles Arizona's program and none would apparently contain the unconstitutional features of the Arizona program. With regard to the issues in the present case, the California proposal would require that scholarships be "portable during the school year and may be used at any qualified school that accepts the eligible student according to a parent's wishes." Assembly Bill 279, 2009-2010 Reg. Sess., § 3(d)(8); the Montana proposal would prohibit STOs from limiting scholarships to a "group of affiliated schools," S.B. 342, 61st Leg., Reg. Sess. §1 (3)(c); the Nevada proposal would require STOs "to allow a child to attend a qualified school which is chosen by a parent or legal guardian of the child" and would prohibit STOs from designating the school at which a scholarship could be used, S.B. 289, 75th Leg., Reg. Sess., §§ 4(2), 6(1); and the Oregon program would credit "expenses actually paid or incurred during the tax year on behalf of an eligible student of whom the tax payer is a parent" and provide scholarships only for "low-income eligible students or eligible students with special needs." H.B. 2754, 75th Leg., Reg. Sess. § 3(2), (1)(g)(B) (Or. 2009). None of these proposals had been reported out of committee when this brief was written.

tax-credit programs that use non-religious school tuition organizations to award scholarships. That religiously-neutral option is available to Arizona. Intervenor Arizona School Choice Trust, for example, is a large, non-religiously affiliated STO that was instrumental in the initial enactment of the Arizona program and that awards scholarships without reference to religion. Arizona's insistence on continuing to use religious organizations to award scholarships that can only be used at religious schools supports respondents' contention that religious neutrality and full parental choice are not objectives of Arizona's program.

### C. The Decision Below is Clearly Correct.

The opinion in *Zelman v. Simmons-Harris* summarized its reasons for decision in the following language:

> In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.

536 U.S. 639, 662-663 (2002) It is clear that the

individuals "defined only by financial need and residence in a particular school district," to which this language refers - - the individuals who are entitled to "genuine choice" - - are the parents of children seeking vouchers, not taxpayers without children who are permitted to influence parental choice under the Arizona program. It is also clear that the *Zelman* Court believed that, to survive Establishment Clause scrutiny, the *Zelman* program had to be "entirely neutral with respect to religion," not only in theory, but in the way vouchers were actually awarded.

If respondents' allegations are true, the Arizona program fails to meet every one of the *Zelman* standards. In opposing certiorari, petitioners and their amici either misstate the way the Arizona program actually operates, misunderstand the meaning of the opinion below, or misperceive both of these things. Arizona's program is clearly not, for example, a program of private charity. It is a *state* program that uses *state* tax revenues to serve the *state's* purported educational purposes. No private charitable contributions are involved. Nor is the decision below based on the fact that most Arizona program scholarships are used at religious schools. It is based on the allegations that the majority of Arizona's scholarships are *awarded* to parents on the basis of religion by the organizations that the state has empowered to grant the scholarships, that those awards *require* parents to send their children to religious schools, and that the Arizona program is not designed to serve, and does not in fact serve, its purported non-religious purposes.

Petitioners' basic contention appears to be that,

so long as the Arizona program is religiously neutral *on its face*, it passes constitutional muster, regardless of how it might lack religious neutrality in actual operation. If the court below had agreed with this argument, it would have committed error. Constitutional protections, including the Establishment Clause, are concerned not solely with facial neutrality. They are concerned with how government programs actually function. If respondents are given the opportunity to prove the truth of their factual allegations, they will show that the Arizona program functions in disregard of the Constitution's requirements that state-funded scholarships be awarded without reference to religion, and that parents - - not STOs and taxpayers - - have the right to choose where those scholarships will be used.

## CONCLUSION

The petitions for writs of certiorari should be denied.

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# In The Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, *et al.*,

*Petitioners,*

v.

KATHLEEN M. WINN, *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals**

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## I. THE PANEL OPINION DIRECTLY CONFLICTS WITH THE ARIZONA SUPREME COURT'S DECISION IN *KOTTERMAN V. KILLIAN*

The Respondents' assertion that there is no conflict between the panel opinion and the Arizona Supreme Court is wrong.

### A. The Panel Opinion Is In Direct Conflict With The Arizona Supreme Court's Holding That The Tuition Tax Credit Serves The Valid, Secular Purpose Of Expanding Educational Options For Parents Of Every Income Level

The panel opinion holds that Respondents have asserted a viable claim against Arizona's stated secular purpose for enacting the challenged tuition tax credit law. App. 19. The Arizona Supreme Court has already considered this question in the context of an Establishment Clause challenge. *Kotterman v. Killian,* 972 P.2d 606, 611-12 (Ariz. 1999). Without reservation, the Arizona Supreme Court declared that the tuition tax credit was enacted for a valid secular purpose. *Id.* The conflict between Arizona's highest court and the panel opinion could not be starker.

Respondents make two additional, significant errors regarding the secular purpose that motivated Arizona to enact the tuition tax credit. First, they argue that the tax credit was enacted solely to help low-income children and that a recent spate of newspaper articles with dubious conclusions demonstrate

a failure to achieve that purpose because a large number of children from middle-income families receive tax-credit-funded scholarships. Br. Opp'n 8-9. But the State did not intend the tuition tax credit to aid only low-income families. As the panel itself noted, the tax credit is intended to provide "equal access to a wide range of schooling options for students of *every* income level. . . ." App. 18 (emphasis added).

The State has never argued that "the Tuition Tax Credit will primarily benefit the poor," App. 61, nor did it enact the tuition tax credit solely as a means of aiding low-income families. Instead, as the Arizona Supreme Court emphasized, the tuition tax credit is part of a larger legislative agenda to "expand[ ] the options available in public education . . . [by] bring[ing] private institutions into the mix of educational alternatives open to the people of [Arizona]." *Kotterman*, 972 P.2d at 611.

Moreover, based on the newspapers' own reporting, the tax credit undeniably helps thousands of financially needy families. For example, the *Tribune* reported that at least seven School Tuition Organizations provide money exclusively to low-income families. Ryan Gabrielson and Michelle Reese, *Tax credit sponsor's vision unrealized*, East Valley Tribune, Aug. 7, 2009, at A6. While the article only named three of those seven organizations, those being the Petitioner-Intervenor Arizona School Choice Trust, the Catholic Tuition Organization of the Diocese of Phoenix, and the Catholic Tuition Organization for the Diocese of Tucson, those three organizations in 2008 controlled over one-third of all the

money available for scholarships and together awarded 9,719 scholarships. App. 221, 223.

The Respondents' final error is their reading of this Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), as requiring that private school choice programs be motivated by a purpose to rescue children from failing public schools. Br. Opp'n 1, 20-21. The Respondents' attempt to cabin *Zelman* to its specific facts while ignoring its logical underpinnings is strained and unpersuasive, not only in light of the precedent leading up to *Zelman*, but also in this Court's most recent post-*Zelman* decision.

This Court's pre-*Zelman* decisions identify numerous different, and completely valid, secular purposes. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 5 (1993) (providing education to handicapped children a valid secular purpose); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 485-86 (1986) (providing vocational rehabilitation services to the blind a valid secular purpose); *Mueller v. Allen*, 463 U.S. 388, 395 (1983) (defraying costs of private education a valid secular purpose); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973) (relieving overburdened public school system by providing financial aid to families who attend private schools a valid secular purpose). In *Locke v. Davey*, this Court unanimously held, pursuant to *Zelman*, that a post-secondary private school voucher designed to aid academically gifted students attend private colleges—and even to pursue degrees in devotional theology—passes muster under the Establishment Clause. *Locke v. Davey*, 540 U.S.

712, 719 (2004). That the secular purpose in *Zelman* was to rescue children from Cleveland's failing schools in no way suggests that that is the only purpose for which a state may enact educational aid programs. And as the District Court below wisely noted, "no useful purpose would be served by making the State wait until its schools were in the same kind of trouble as Cleveland's before implementing a program of true private choice." App. 62.

Respondents' continued focus on matters that are, in the District Court's words, "irrelevant to the constitutional analysis," App. 61, lays bare the fact that their case is not about vindicating constitutional rights, but rather it is an attempt to use the courts to halt a policy they do not like.

### B. The Panel Opinion Is In Direct Conflict With The Arizona Supreme Court's Holding That The Tuition Tax Credit Does Not Involve State Funds Or State Appropriations

There is a fundamental conflict between the panel opinion and the Arizona Supreme Court's decision in *Kotterman* regarding the way tax-credit-eligible donations are viewed. *Kotterman* clearly views them as private funds and not public money. *Kotterman*, 972 P.2d at 618 ("[U]nder any common understanding we are not here dealing with 'public money.'"). The panel, however, rejected *Kotterman*'s conclusion. App. 13 ("[W]e reject the suggestion that this money is not publicly subsidized."). The panel

and the Arizona Supreme Court treat the money donated to School Tuition Organizations by taxpayers in a completely incompatible manner, necessitating review and resolution by this Court.

The Respondents try to transmute the tuition tax credit from a program of private charity into a government-run operation by arguing that Arizona relies on "non-governmental organizations . . . to award scholarships from state funds on its behalf." Br. Opp'n 4. Indeed, throughout their brief Respondents use deliberately misleading phrasing by talking about the tuition scholarships as public funds. *E.g.* Br. Opp'n 1, 22. This is nothing short of legal alchemy. Simply authorizing a tax credit for modest donations by third parties to School Tuition Organizations to fund tuition scholarships does not alter the private nature of the donations. Other than purely ministerial tasks, the State of Arizona plays no role in the administration or operation of the tuition tax credit. No state actor urges or encourages taxpayers to write a check to any School Tuition Organization. No state actors are involved in the establishment of School Tuition Organizations. It is entirely up to private individuals to establish these charitable organizations and to solicit donations from individuals.

As the Arizona Supreme Court explained, the argument that the government "effectively controls and exerts quasi-ownership" of taxpayers' money merely because those funds "*could* enter the [state] treasury . . . is fraught with problems." *Kotterman*, 972 P.2d at 618. The most glaring problem is that the

Respondents' argument "directly contradicts the decades-long acceptance of tax deductions for charitable contributions . . . made directly to churches, religiously-affiliated schools and institutions." *Id.* Respondents attempt to evade this problem by emphasizing that the challenged tax credit is dollar-for-dollar, whereas deductions reduce tax liability by a percentage of the donation. However, if Respondents' theory is correct, then a percentage of every donation by every individual to every charitable organization—including donations made directly to churches and religious institutions—constitute public money.

The panel and Respondents fail to appreciate the significance of the fact that School Tuition Organizations are federally recognized charitable organizations and that the tuition tax credit law, A.R.S. § 43-1089, merely allows School Tuition Organizations to operate like any other private charity that funds tuition scholarships. Every other similar charity retains the right to award scholarships only to kids attending particular religious schools and contributions to such religiously affiliated charities still qualify as a federally deductible charitable contribution. Neither the panel nor the Respondents have offered any justification for treating donations to scholarship-granting organizations that are eligible for a state tax credit as public funds on the one hand, while treating donations to scholarship-granting organizations that are eligible for a federal tax deduction as private funds on the other hand.

This Court should grant certiorari and reverse the panel opinion, which is a dramatic departure from settled law regarding the constitutionality of religiously neutral tax benefits.

## II. THERE IS NO FACTUAL DISPUTE REGARDING THE TAX CREDIT'S OPERATION

The panel opinion and the Respondents try to create an ambiguity in the tuition tax credit law and in the Arizona Supreme Court's *Kotterman* decision where none exists. The Respondents assert that the Arizona Supreme Court assumed there would be no religiously affiliated School Tuition Organizations in Arizona. Br. Opp'n 15. That assertion is demonstrably false.

Both the majority opinion and the dissenting opinion in *Kotterman* understood that the tuition tax credit law allows School Tuition Organizations to organize themselves along religious lines so long as they award scholarships to at least two schools. The Respondents deliberately omit a full half of the quote in their parenthetical on page 15 of their opposition brief without even signaling to this Court with ellipses that they have omitted part of the sentence. The *Kotterman* majority's full quote is: "Every S[chool] T[uition] O[rganization] must allow its scholarship recipients to 'attend any qualified school of their parents' choice,' *and may not limit grants to students of only one [qualified school].*" *Kotterman*,

972 P.2d at 614 (emphasis added). The dissent was equally straightforward in its explanation of how the program would operate. It said, "In fact, a group of taxpayers who subscribe to a particular religion may form a[ ] S[chool] T[uition] O[rganization] that will support only schools of that religion." *Kotterman*, 972 P.2d at 626 (Feldman, J., dissenting).

Throughout their opinion, the *Kotterman* majority did not hesitate to respond to arguments made by the dissent. *E.g.*, *Kotterman*, 972 P.2d at 625 (responding to dissent's discussion of Washington State cases). However, the majority never quibbles with the dissent's characterization of the tuition tax credit as allowing religiously affiliated School Tuition Organizations to award scholarships only to religious schools. The obvious reason, based both on the majority opinion's clear understanding that School Tuition Organizations must give to at least two schools and on its silence with regard to the dissent's characterization of the tuition tax credit, is that the majority knew this is how the program would operate and still concluded the tuition tax credit was a religiously neutral program.

The simple fact is that no party to this case disputes the manner in which the tuition tax credit operates. The Respondents' suggestion that there is a fact question to be proved on remand with regard to how School Tuition Organizations in Arizona raise funds and issue scholarships is simply not true. Br. Opp'n 14. Taking every allegation in Respondents' Complaint, App. 195-205, as true, and construing

those allegations in the most favorable light, they have not stated a claim under the Establishment Clause for which relief may be granted. As this Court has "repeatedly recognized[,] . . . no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." *Zelman*, 536 U.S. at 654-55.

## III. OTHER STATES ALLOW RELIGIOUSLY AFFILIATED TUITION ORGANIZATIONS TO OPERATE

Respondents are wrong that other states with tax credits for scholarship fund donations do not allow religiously affiliated scholarship-granting organizations to operate. Except Florida, every other third-party tuition tax credit program permits religiously affiliated scholarship-granting organizations to operate.[1] Clearly, these other programs could be affected

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[1] In Pennsylvania, the Catholic Conference Scholarship Foundation is "a scholarship foundation to help students attend Catholic schools in Pennsylvania." Pennsylvania Catholic Conference, *PCC Scholarship Foundation*, http://www.pacatholic.org/about-the-pcc/pcc-scholarship-foundation (last visited Apr. 30, 2010). In Georgia, the G.R.A.C.E. scholarship organization "offers families the prospect to access a faith based, academically strong, and community based Catholic school in the State of Georgia." G.R.A.C.E. Scholars, Inc., http://www.gracescholars.org (last visited Apr. 30, 2010). In Rhode Island, F.A.C.E. offers scholarships to 46 participating "Catholic elementary and

(Continued on following page)

by the panel decision. Respondents also claim that "[t]ax-related school choice programs" are typically personal use tax credits. That also is not true. Of the nine state education tax credit programs in operation, seven are third-party tax credits like Arizona's tuition tax credit and two are for personal use—and Iowa has both a personal use tax credit and a third-party tax credit. *See* 35 Ill. Comp. Stat. 5/210; Iowa Code § 422.12. Despite Respondents' claim that Arizona's tax credit is unique, the features that form the basis of their claims are, in fact, quite common.

The panel's decision is clearly erroneous. For the reasons stated in their Petition and herein, the Petitioner-Intervenors Arizona School Choice Trust, et al., respectfully request that their petition be

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secondary schools." Rhode Island Scholarship Alliance, *Scholarship Granting Organizations*, http://www.rischolarshipalliance.org/sgos/index.html (last visited Apr. 30, 2010). The "Our Faith, Our Future, Our Children School Tuition Organization" in Iowa is a Catholic organization serving 56 Catholic schools. Common Thread, *Giving the Gift of Catholic Education*, http://www.xavierfoundation.org/Downloads/xavier%20spring%20NL.pdf (last visited Apr. 30, 2010).

granted and urge this Court to summarily reverse the panel opinion.

Respectfully submitted,

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No. 09-988

IN THE

# *Supreme Court of the United States*

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ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, *et al.*,

*Petitioners,*

v.

KATHLEEN M. WINN, *et al.*,

*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF OF THE CATO INSTITUTE, FOUNDATION FOR EDUCATIONAL CHOICE, AMERICAN FEDERATION FOR CHILDREN, AND ANDREW J. COULSON AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Does a state law giving tax credits to people who donate to scholarship organizations violate the Establishment Clause simply because some donors—as it happens, a declining majority—choose to fund scholarship programs affiliated with religious schools?

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## INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs.

The Foundation for Educational Choice was founded on the ideals and theories of Nobel Laureate economist Milton Friedman and economist Rose D. Friedman. The Foundation strives to educate parents, policymakers, and other organizations about the desperate need for a shift of power to the disenfranchised parents of America who have limited choices in the education of their children.

The American Federation for Children is a leading national advocacy organization promoting school choice, with a specific focus on advocating for school vouchers and scholarship tax credit programs. It seeks to improve our nation's K-12 education by advancing systemic and sustainable public policy that empowers

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[1] Counsel of record for all parties received notice at least 10 days before the due date of *amici's* intention to file this brief. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk. No party's counsel authored this brief in whole or in part and no persons other than *amici* or their counsel made a monetary contribution to its preparation or submission.

parents, particularly those in low-income families, to choose the education they determine is best for their children. The Federation envisions a vibrant and successful education system where achievement is high and where low-income children are provided with equal opportunity to attend the finest schools possible, whether these schools are public, charter, or private.

Andrew J. Coulson directs the Cato Institute's Center for Educational Freedom and is author of *Market Education: The Unknown History* (Transaction Books, 1999), a comparative review of school systems from classical Greece to modern America, England, Canada, and Japan. He has also produced the most comprehensive worldwide review of the statistical research comparing alternative school systems (*Journal of School Choice*, Vol. 3, No. 1, 2009). Coulson has written extensively about education tax credit programs for many years.

This case is of central concern to *amici* because it affects a broad range of educational tax credits and deductions at the state and national levels and because the freedom of choice in education would be seriously injured if this lawsuit succeeds.

## STATEMENT OF THE CASE

Respondents allege that Arizona's Revised Statute § 43-1089 ("Section 1089") violates the First Amendment's Establishment Clause. Section 1089 provides citizens who voluntarily donate to school tuition organizations ("STOs") with a tax credit of up to $500 for individual taxpayers and up to $1000 for married couples filing jointly. Ariz. Rev. Stat. Ann. § 43-1089(A) (2010). An STO must use at least 90 percent of its annual revenue to provide educational scholarships that allow children to attend a qualified private school of their parents' choosing. *Id.* § 43-1089(G)(3). An STO may limit the number of schools to which it provides such scholarships, so long as it provides them to more than one school. *Id.*

Initially, the district court dismissed the suit as barred by the Tax Injunction Act. The Ninth Circuit reversed, *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002), and this Court affirmed, *Hibbs v. Winn*, 542 U.S. 88 (2004). On remand, the district court granted defendants' motion to dismiss for failure to state a claim under the Establishment Clause. The Ninth Circuit reversed, holding that "plaintiffs have alleged facts upon which a reasonable, informed observer could conclude that Section 1089, as applied, violates the Establishment Clause even though the state does not directly decide whether any particular sectarian organizations will receive program aid." *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1023 (9th Cir. 2009) (panel). The Ninth Circuit subsequently denied rehearing *en banc*. *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649 (9th Cir. 2009) (en banc).

## SUMMARY OF REASONS FOR GRANTING THE PETITION

This case presents the Court with the chance to preserve *stare decisis* by upholding the standard of "genuine and independent choice" in its Establishment Clause jurisprudence. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). Section 1089 has created numerous instances of such private choice that insulate the program from any Establishment Clause challenge. By allowing such a challenge to go forward, the Ninth Circuit blatantly ignored this Court's precedent and harmed countless children's educational opportunities.

Most importantly, a taxpayer's choice of which STO to donate to—and whether to donate at all—is wholly within the discretion of that taxpayer. Any benefit to religious institutions is merely incidental to that choice. If left uncorrected, the Ninth Circuit's error will be widely cited and potentially invalidate not only the numerous education tax credit programs enjoyed by tens of thousands of students, but also charitable tax deduction programs that serve millions of beneficiaries. The Ninth Circuit's faulty reasoning and blatant misreading of this Court's jurisprudence jeopardizes each of these programs.

Far from advancing or endorsing religious education—via Section 1089 or otherwise—Arizona maintains a substantial financial disincentive to it. For example, parents receiving aid from an STO are still required to spend several thousand dollars of their own money to send their children to religious schools. In contrast, tuition at both charter and regular public

schools is free. Parents thus have a strong motive *not* to choose a private religious institution over the tuition-free public system.

Moreover, the Ninth Circuit's conclusion that parents in Arizona are pressured to accept scholarships to religious schools due to the limited number of scholarships available to secular schools is simply not supported by the evidence. But the share of STO scholarships *not* reserved to religious schools is now almost twice as large as the share of families choosing secular schools. In fact, the percentage of scholarships reserved for religious schooling fell to 76 percent by 2004, and 65 percent in 2008. Andrew Coulson, *The Case of the Missing Evidence*, (Jan. 26, 2010), http://www.cato-at-liberty.org/2010/01/26/the-case-of-the-missing-evidence. Parents thus have ample opportunity to obtain STO funds for their children to attend secular schools.

Finally, programs like Section 1089 are necessary across the country to preserve parents' true choice in the education of their children. That is because the freedom to choose which STOs to support under Section 1089, and the freedom of the STO to focus its scholarship funds on certain schools, provides educational opportunities to a broad range of schools that many children would otherwise be unable to attend. Section 1089 fundamentally broadens the educational choice of Arizona parents and the educational opportunities of their children. This Court's precedent supports both of these goals.

## REASONS FOR GRANTING THE PETITION

### I. This Case Has Broad Implications; Similar Programs Around the Nation Will Be Affected

Florida, Georgia, Indiana, Iowa, Pennsylvania and Rhode Island have programs like the one at issue here. All but Florida's are jeopardized by the Ninth Circuit ruling because they, like Section 1089, allow STOs to cater to religious constituencies. Pennsylvania's program alone served 44,000 students in 2007-08. Alliance for School Choice, *School Choice Yearbook: 2008-09*, at 51 (2009). And interest in these programs is growing: In 2009, 12 scholarship tax credit bills were introduced in state legislatures. The Foundation for Educational Choice, *School Choice Legislation*, http://www.edchoice.org/schoolchoice/ShowLegislation.do (last visited Mar. 16, 2010).

Because both the number of programs and the number of students served by each program have grown steadily over the past decade, the long-term repercussions of this litigation will be profound. If current trends are allowed to continue, many hundreds of thousands of children nationwide will be served by programs like Arizona's in the next decade. But if the Ninth Circuit's ruling stands, it would not only curtail this growth but likely reverse it, as existing and potential donors fear the tax implications of claiming credits that are subsequently struck down.

In short, the educational choices of tens of thousands of students in six states depend on the resolution of this case, as do the prospective choices of many more students in coming years.

## II. Arizona's Law Involves a System of Genuine and Independent Private Choice That Insulates It From Establishment Clause Challenges

While Section 1089 does nothing to favor children attending religious schools, individual Arizonans have indeed donated the majority of their scholarship funds to religious STOs. Therefore, according to the Ninth Circuit, "Section 1089, as applied, 'fails to provide genuine opportunities for . . . parents to select secular educational options for their school-age children.'" *Winn*, 562 F.3d at 1018 (quoting *Zelman*, 536 U.S. at 655) (panel). That reasoning is flawed in several respects: first, it mistakenly applies Establishment Clause scrutiny to private choices; second, it proposes a distinction between tax credits and tax deductions that has no basis in law; and third, it invents a distinction between parent and taxpayer choice that is irrelevant to Establishment Clause analysis.

### A. The Ninth Circuit Misapplied the Establishment Clause to Private Choices

In *Zelman*, this Court identified the existence of individual private choice as critical to an educational program's surviving Establishment Clause challenges. "[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause." *Zelman*, 536 U.S. at 652. Much like the program this Court upheld in *Zelman*,

Section 1089 fully complies with the requirement that any aid to religious schools be the result of genuine and independent private choice.

As Judge O'Scannlain recognized in his dissent to the Ninth Circuit's refusal to rehear this case *en banc*:

> Multiple layers of private, individual choice separate the state from any religious entanglement: the "*government itself*" is at least four times removed from any aid to religious organizations. First, an individual or group of individuals must choose to create an STO. Second, that STO must then decide to provide scholarships to religious schools. Third, taxpayers have to contribute to the STO in question. Finally, parents need to apply for a scholarship for their student.

*Winn*, 586 F.3d at 662 (9th Cir. 2009) (en banc) (O'Scannlain, J., dissenting) (emphasis in original). In each of these layers, there is genuine and independent private choice insulating the government from any Establishment Clause challenge.

While the Ninth Circuit alleges that Section 1089 "creates incentives that pressure [secular-education-seeking] parents into accepting . . . scholarships [to] a religious school," *Winn*, 562 F.3d at 1018 (panel), the court failed to consider Arizona's numerous other educational programs.

As this Court noted in addressing the educational program at issue in *Zelman*, "[t]he Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and

that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school." 536 U.S. at 655-56 (emphasis in original).

In Arizona, as Judge O'Scannlain noted,

> [P]ublic schools must provide for open enrollment, allowing parents to send their children, tuition free, to schools of their choice. Tax credits are available for donations to public schools for "extracurricular activities or character education." An extensive system of charter schools "provide[s] additional academic choices for parents and pupils." Homeschooling is permitted and protected. Indeed Section 1089 itself offers parents yet another alternative: they can create their own STO and solicit donations for use at secular private schools.

*Winn*, 586 F.3d at 666 (en banc) (O'Scannlain, J. dissenting) (internal citations omitted).

Arizona provides its citizens a broad range of academic options, only one of which is to obtain an STO scholarship to attend a religious school. The Ninth Circuit thus erred in arguing that Arizona parents are pressured to send their children to religious schools.

### B. The Ninth Circuit Created a Distinction Between Tax Credits and Tax Deductions That Lacks a Legal Basis

Petitioners argue that Section 1089 is essentially equivalent, for Establishment Clause purposes, to long-accepted federal tax deduction programs for charitable donations. The Ninth Circuit panel disagreed, positing that Section 1089 bears only a "superficial resemblance" to federal deductions and so does not partake of their Establishment Clause acceptability. *Winn*, 562 F.3d at 1015 (panel).

But Section 1089 resembles charitable deduction programs—far from superficially—in all the particular features essential to their constitutionality under the Establishment Clause. Of the two cases the Ninth Circuit cites to support its position, the first, *Hernandez v. Comm'r*, 490 U.S. 680 (1989), actually supports Petitioners' position and the second, *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983), is irrelevant.

*Hernandez*, in the course of ruling on the tax deductibility of a particular donation, reaffirmed the constitutionality of a provision, I.R.C. § 170 ("Section 170"), that allows deductions for charitable donations, including to "entities organized and operated exclusively for religious purposes." *Hernandez*, 490 U.S. at 683. The Court upheld Section 170 because it made no distinctions between different religious sects and satisfied the *Lemon* test. *Id.* at 695-96 (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971), finding religious neutrality in both purpose and effect and avoidance of state entanglement with religion).

Section 1089 is even less problematic than Section 170 because it does not refer to religion at all—let alone distinguishing among sects. And Respondents already conceded the first prong of the *Lemon* test—that the Arizona provision is facially neutral with respect to religion—turning this case into an as-applied challenge to the program's effects. *Winn*, 562 F.3d at 1007, n. 6 (panel). Yet Section 1089's primary effect is "encouraging gifts to charitable entities, including but not limited to religious organizations," which the *Hernandez* Court found "does not advance or inhibit religion." *Hernandez*, 490 U.S. at 696.

Finally, the Arizona Department of Revenue's ("ADOR") interactions with religious organizations under Section 1089 are comparable to those of the IRS under Section 170. The IRS's bookkeeping responsibility is merely "routine regulatory interaction which involves no inquiries into religious doctrine . . . no delegation of state power to a religious body . . . and no detailed monitoring and close administrative contact between secular and religious bodies . . . [and thus] does not of itself violate the nonentanglement command." *Id.* at 696-97 (internal citations and quotation marks omitted). Similarly, the ADOR must only determine that STOs use a certain percentage of their revenues on scholarships for K-12 schooling and collect certain data (*e.g.*, number of donations received, total value of donations, etc.). Section 1089 thus creates no doctrinal or other potentially church-state-entangling responsibilities.

In short, Section 1089 possesses all the features the Court deemed necessary to Section 170's survival under the Establishment Clause—and so *Hernandez*

undermines the Ninth Circuit's contention that there is any fundamental difference between Section 1089 and federal charitable tax deduction programs.

The only other case the Ninth Circuit cited—without discussion or explanation—to distinguish Section 1089 from charitable deduction programs with respect to the Establishment Clause is *Regan*. 461 U.S. 540. *Regan*, however—an appeal from the denial of tax-exempt status by a group lobbying on federal taxation issues—has no relation to Establishment Clause challenges to government programs. Indeed the word "Establishment" is wholly absent from the case. The First Amendment aspects of *Regan* are limited to the Free Speech Clause, which no party contends is at issue here.

In sum, the Ninth Circuit can find no support in this Court's precedent—or other law—to distinguish Section 1089 from functionally equivalent programs that have been held constitutional. The lower court's analysis thus urges the absurd and untenable result of invalidating federal charitable tax deductions.[2]

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[2] Religious organizations have received more donations than any other type of charity; in 2008, they received 34.7 percent of all charitable contributions, compared to 13.3 percent for educational organizations. National Center for Charitable Statistics, *Quick Facts About Nonprofits* (2008), http://nccs.urban.org/statistics/quickfacts.cfm. While the ultimate recipients of the donated funds—who may be seeking food, shelter, medical services, etc.—have their options circumscribed by taxpayer decisions, deductions for donations to religious charities have passed constitutional muster.

### C. The Ninth Circuit Invented a Distinction Between Parent and Taxpayer Choice That Is Irrelevant to Establishment Clause Analysis

Finally, the choice of which STO to donate to—and the choice of whether to donate to an STO at all—remains at the taxpayers' sole discretion. The Ninth Circuit seems to apply to the free, private, ever-evolving choices of countless Arizona taxpayers the same constraints imposed on government decisions by the Establishment Clause. As the Arizona Supreme Court recognized in analyzing this very statute, however, "[t]he decision-making process is completely devoid of state intervention or direction and protects against the government 'sponsorship, financial support, and active involvement' that so concerned the framers of the Establishment Clause." *Kotterman v. Killian*, 972 P.2d 606, 614 (Ariz. 1999) (quoting *Waltz v. Tax Comm'n of New York*, 397 U.S. 664,668 (1970)).

Nonetheless, the Ninth Circuit attempts to distinguish the statutory scheme in Section 1089 by arguing that "unlike parents, whose choices directly affect their children, taxpayers have no structural incentives under Section 1089 to direct their contributions primarily for secular reasons, such as the academic caliber of the schools to which a STO restricts aid, rather than for sectarian reasons . . . ." *Winn*, 562 F.3d at 1022 (panel). In doing so, the court not only ignores the aforementioned federal charitable tax deduction system—which has been upheld as constitutional despite involving purely taxpayer choice—but provides no sound reason for accepting its characterization of taxpayer motivations.

While the taxpayers' choice of which STO to support under Section 1089 will have no direct effect on his or her own child, the court does not (and cannot) identify a reason to believe that a taxpayer considering an STO donation would not take into account the potential schools' academic performance in addition to any religious affiliations. The same is true for any parent deciding on a private school for their child. There is thus no rational reason for drawing the distinction the Ninth Circuit makes between taxpayers and parents.

## III. Arizona Does Not Promote Religious Education

This Court's precedent unambiguously holds that the actual share of students enrolled in religious schools under a neutral program of true private choice is immaterial to that program's constitutionality under the Establishment Clause. *See Zelman*, 536 U.S. at 639; and *Mueller v. Allen*, 463 U.S. 388 (1983). Even if we ignored that finding, however, Arizona most certainly does not favor religion.

As noted above, *all* available education programs must be considered when determining whether or not government is favoring religious instruction in violation of the Establishment Clause. *Zelman*, 536 U.S. at 655-56. When we do this here, we find that, far from favoring religious instruction, Arizona maintains a substantial financial disincentive to it.

Arizona operates a system of district-based public schools and a network of semi-autonomous public

charter schools, supports private school choice through Section 1089, and permits home-schooling. The 2008-09 breakdown of funding and participation for the first three categories is given in Table 1.[3]

Table 1 shows that the tax credits granted under Section 1089 are 185 times smaller in value than Arizona's expenditures on strictly secular district and charter schools. The number of children benefiting from the credits is 38 times smaller. The average scholarship size, $1,909, is less than one quarter the per-pupil funding available to students in charter schools, and roughly one fifth the funding available to traditional public school students. To put that last figure in perspective, a 2006 study by *amicus* Coulson found average day tuition at Arizona private schools to have been $4,398 during the 2004-05 school year ($4,923 in 2009 dollars). Andrew Coulson, *Arizona Public and Private Schools: A Statistical Analysis*, Goldwater Institute, Policy Report No. 213 (2006).

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[3] Table 1. Funding & Participation in Arizona K-12 Education

| | District Schools | Charter Schools | Section 1089 |
|---|---|---|---|
| Students | 979,841 | 99,018 | 28,321 |
| Total Expenditures | $9,239,346,175 | $768,228,014 | $54,063,195 |
| Per Pupil Expenditures | $9,429 | $7,758 | $1,909 |

Created using data from Tom Horne, *Superintendent's Annual Report for Fiscal Year 2008-2009*, Vol. 1, at 47-48 (2010); Gale Garriott, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2008* (2008).

A corollary to the above figures is that even parents who receive STO scholarships must spend several thousand dollars of their own money to send their children to religious schools. By contrast, both charter and district public schools are tuition-free. And as this Court said in *Zelman*:

> Families too have a financial disincentive to choose a private religious school over other schools. Parents that choose to participate in the scholarship program . . . must co-pay a portion of the school's tuition. Families that choose a community school, magnet school, or traditional public school pay nothing. Although such features of the program are not necessary to its constitutionality, they clearly dispel the claim that the program "creates . . . financial incentive[s] for parents to choose a sectarian school."

536 U.S. at 654 (quoting *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993)).

Given all the options Arizona parents have for their children's education—and the state's disproportionate support for secular ones—it is absurd to suggest that the state coerces them into choosing religious schools. *See* Tim Keller, Op-Ed., *Not An Endorsement of Religion*, National Law Journal, Mar. 8, 2010, at 38.

## IV. Respondents Rely on a Moving Statistical Target That Has Never Supported Their Argument

In *Mueller*, this Court said that it would "be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." 463 U.S. at 401. Applying this precedent in *Zelman*, the Court stated that:

> To attribute constitutional significance to [the local percentage of religious private schools] would lead to the absurd result that a neutral school-choice program might be permissible in some [places] . . . but not in [others] . . . . The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.

536 U. S. at 657-58.

The Ninth Circuit acknowledged this precedent, *see Winn*, 562 F.3d at 1018 n.14 (panel), but then chose to discount it, finding that, as Respondents allege,

> [T]he choice delegated to taxpayers under Section 1089 channels a disproportionate amount of government aid to sectarian STOs, which in turn limit their scholarships to use at religious schools. The scholarship program thus skews aid in favor of religious schools, requiring

> parents who would prefer a secular private school but who cannot obtain aid from the few available nonsectarian STOs to choose a religious school to obtain the perceived benefits of a private school education.

*Id.* at 1013.

For the reasons described above, the Ninth Circuit's reasoning misuses Supreme Court precedent by improperly applying to the independent choices of taxpayers the Establishment Clause's restrictions on government religious bias--and by failing to consider Section 1089 in the context of the overwhelming predominance of secular education programs in the state. But what if we were to ignore precedent and to suppose that the distribution of scholarships reserved for religious education is constitutionally relevant? Would the lower court be correct in concluding that Section 1089 "skews aid in favor of religious schools, requiring parents who would prefer a secular private school . . . to choose a religious school . . ."? *Id.*

The answer is no. A simple preponderance of scholarship availability for religious schools would not mean that parents seeking secular private schooling would be any less likely to obtain a scholarship than parents seeking religious schooling. To support the Ninth Circuit's holding, it would be necessary to show that secular parents were in fact being rejected for scholarships in greater proportion than their religious peers—or, at the very least, to show that the share of scholarships reserved for religious schooling was *greater than the share of private school demand already given over to religious schools due to parental*

*preferences.* Because if the share of scholarships reserved for religious schools is less than or equal to the share of private school students already enrolled in religious schools, then there is no evidence that parents seeking secular schools would be at a disadvantage in obtaining a scholarship.

So what are the facts? Respondents allege that, in 1998, 94 percent of donated scholarship funds went to STOs that reserved them for use at religious schools. Compl. 3, n. 15. That was the first year in which Section 1089 was in operation, however, and little funding was actually distributed, as Respondents acknowledge. According to Respondents' own complaint, the share of scholarships *actually distributed* in 1998 that were reserved for use at religious schools was 75 percent, not 94. *Id.* at 4.

Was this larger than the actual religious share of private school enrollment? No. Based on U.S. Department of Education data, we estimate that the share of Arizona private school students attending religious schools in 1998-99 was 75.5 percent.[4] The share of scholarship funds reserved for religious schooling was an almost precise match for the share of private school students statewide whose parents

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[4] The Department of Education periodically conducts a "Private School Universe Survey," though it did not do so in the relevant 1998-99 school year. It did, however, conduct its survey in both 1997-98 and in 1999-2000. If we estimate the Arizona religious enrollment share for 1998-99 by averaging together the percentages for those years bracketing it, we arrive at 75.5 percent. Andrew Coulson, *The Case of the Missing Evidence*, (Jan. 26, 2010), http://www.cato-at-liberty.org/2010/01/26/the-case-of-the-missing-evidence.

preferred that they be enrolled in religious schools. (In fact, it was slightly lower.) There is no evidence that the small fraction of private school parents seeking secular schooling would have had any less access to scholarships in 1998 than the much larger share seeking religious schooling.

And one cannot reasonably argue that Section 1089 itself substantially inflated the religious share of private sector enrollment in the 1998-99 school year. Respondents admit that, no more than $276,445 was awarded in scholarships in 1998—too small a sum to have substantially affected the distribution of private school enrollment state-wide.[5] Further, the average religious share of enrollment for the three preceding years for which data are available (1993-94, 1995-96, 1997-98) is 75.7 percent—again *above* the share of scholarships reserved for religious schools in 1998-99. *See* Coulson, *The Case of the Missing Evidence, supra.*

Most damning for Respondents' case is the fact that the share of total scholarship donations reserved for use in religious schools has fallen significantly since 1998. As already noted, Respondents allege that it was 94 percent in 1998 (the bulk of which was not distributed in that year). Based on our calculations from the official tabulations published by the ADOR, that share had fallen to 76 percent by 2004, and to 65 percent in 2008. The latter figure is more than 15 percentage points below the share of Arizona private school students enrolled in religious schools in the

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[5] Calculated from notes 15 through 19 of the Respondents' complaint. *See* Compl. 3-4, nn. 15-19.

most recent year for which data are available (81 percent in 2007-08). *Id.* In other words, *the share of scholarship funding that is not reserved for religious schools is currently almost twice as large as the share of families choosing secular schools.* There is thus no evidence that families seeking secular schooling would have any more difficulty obtaining scholarships under Section 1089 than those who prefer religious schooling.

The evidence just presented serves to underline the wisdom of Supreme Court precedents such as *Zelman*: it would indeed be "absurd" to rule on the constitutionality of a religiously neutral program based on statistical targets that vary from place to place and over time, solely as a result of changes in private choices.

## V. Far from Being an Impediment to Parental Freedom, the Autonomy Granted to Taxpayers and STOs Under Section 1089 Is Ultimately Essential to It

Respondents are implicitly concerned with maximizing the freedom of parents to choose schools that comport with their values, and believe—contrary, as we have shown, to both evidence and precedent—that Section 1089 is unconstitutionally injurious to that end. Similarly, the Ninth Circuit misconstrued Section 1089 as harmful to "the secular purpose of the program, which is to provide equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents." *Winn*, 562 F.3d at 1022 (panel).

Going beyond the errors in Respondents' and the Ninth Circuit's reasoning, described above, Section 1089 and similar programs are not simply *compatible* with the unfettered exercise of parental choice, they are ultimately *essential* to it. If Respondents' suit is successful, it will impede rather than advance Respondents' own implicit goal.

After 16 years of studying school systems in an international and historical context, *amicus* Coulson concludes that taxpayers' freedom to choose STOs, and of STOs to focus their scholarships on certain schools, is necessary to preserve parental choice in the long term. The reason is straightforward: The curriculum offered in elementary and secondary education systems paid for by third parties is invariably limited by the preferences of those who fund them. Therefore, to ensure that families with limited means have access to a wide range of educational choices, it is necessary to provide a proliferation of different sources of tuition aid. This is true under both autocratic and democratic governments, and it is true whether the third party funder is a private or a government organization. *See* Coulson, *Market Education*, *supra*.

Consider, first, the case of private funding. When left to their own devices, people do not generally subsidize activities they find morally objectionable or that violate their convictions. When they make voluntary contributions to philanthropic causes, they tend to choose ones that specifically comport with their values. The scope of services provided by any one charitable organization thus reflects the values of its donors; it usually offers a limited subset of the services that it could conceivably provide. The Nature

Conservancy does not subsidize paving contractors, for example, and evangelical Protestant charities do not evangelize in favor of Catholicism.

The crucial point is that *so long as there is a multiplicity of charitable organizations, a wide range of services will be available to the ultimate beneficiaries.* By allowing anyone to start an STO, Section 1089 has led to the rise of a wide range of STOs, from among which parents seeking scholarships may select the one most consistent with their own values.

Now compare this to the case of a third-party payment system operated by a democratic government, which encompasses both Arizona's district and charter public school systems. From the start, parents in both of those systems lose all religious education options due to the Establishment Clause. And yet, as we have seen, there is strong demand in Arizona for religious educational options, so these systems present a drastic constraint on parents' educational freedom of choice. And contrary to Section 1089, parents cannot shop around for an alternative funder in the charter or traditional public school sectors. Government-funded education systems are, by definition, single-payer.

But the advantages of Section 1089 extend beyond merely expanding parents' educational options. In his *Zelman* dissent, Justice Breyer posited that compelling taxpayers to fund religious schooling "risks creating a form of religiously based conflict potentially harmful to the Nation's social fabric." 536 U.S. at 728-29 (Breyer, J., dissenting). Even if the Court were now to agree with that argument—the *Zelman* Court found it

irrelevant to Establishment Clause analysis, *id.* at 662, n.7—it does not apply here. Under Section 1089, nobody is ever compelled to support religious schooling: Taxpayers may choose to donate to secular STOs—or forego donating to any STO.

Indeed, Section 1089's reliance on voluntary donations makes it not simply *equivalent* to public schooling for purposes of minimizing social conflict caused by taxpayer compulsion but *superior* to it. While taxpayers are not compelled to fund religious education under the public school system, they are compelled to fund instruction in a host of ideologically and morally charged areas that have precipitated social conflicts—from the teaching of history and evolutionary biology to sex education and even different reading methodologies. *See* Coulson, *Market Education*, *supra*; Stephen Arons, *Compelling Belief, The Culture of American Schooling* (Univ. of Mass. Press 1983).

Eliminating this compulsion-based source of potential conflict confers an additional benefit on Section 1089: It relieves pressure to restrict parents' choices through the regulation of their educational options. Since no taxpayer is compelled to support a form of education he finds objectionable, he has much less incentive to lobby for regulations curtailing such education. While individual STOs may only support schools of a particular religion or outlook, parents are free to seek scholarships from any STO they choose. The possibility of a tyranny of the majority with regard to pedagogical options is thus considerably reduced under Section 1089 as compared to a single payer system such as public schooling.

Making tuition assistance available from a multiplicity of sources thus offers unique advantages in advancing the goal of providing low-income families with access to a wide variety of choices over the long term, while simultaneously avoiding the compulsion of taxpayers that concerned Justice Breyer in his *Zelman* dissent. Section 1089 is the solution, not the problem.

## CONCLUSION

It is difficult to find a better or more succinct conclusion to our arguments than the one offered by Judge O'Scannlain in his dissent from the Ninth Circuit's refusal to rehear this case *en banc*. And so we echo it here: "Because the three-judge panel's decision strays from established Supreme Court precedent, and because it jeopardizes the educational opportunities of thousands of children who enjoy the benefits of Section 1089 and related programs across the nation . . . ," *Winn*, 586 F.3d at 671 (en banc) (O'Scannlain, J., dissenting), we respectfully request that this Court grant this petition.

Respectfully submitted.

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# In The Supreme Court of the United States

ARIZONA SCHOOL CHOICE TRUST, *et al.*,

*Petitioners,*

v.

KATHLEEN M. WINN, *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF FOR THE GOLDWATER INSTITUTE, SCHARF-NORTON CENTER FOR CONSTITUTIONAL GOVERNMENT, AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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## MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Goldwater Institute petitions the Court for leave to file the attached brief as *amicus curiae*. The Goldwater Institute, a tax exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code, advances public policies that further principles of limited government, economic freedom and individual responsibility. Dr. Matthew Ladner, the primary author of the brief, is Vice President of Research at the Goldwater Institute and an expert in the field of school choice. The Goldwater Institute's interest in filing this brief is to provide useful and relevant factual information regarding the educational options and fiscal policy that drive school choice in Arizona. To the best of the Goldwater Institute's knowledge, this information has not been brought to the Court's attention in the parties' pleadings.

On March 18, 2010, the Goldwater Institute determined that it could devote the necessary resources to author and file its brief. The very same day, the Institute immediately notified and sought consent from all parties via e-mail and USPS First Class mail. Because Petitioners' reply briefs are due on March 24, 2010, the Goldwater Institute's *amicus brief* is also due on March 24, 2010. SUP CT. R. 37.2(a). Although no party objects to the filing of this brief, and the Institute diligently notified all parties, it was nevertheless unable to comply with Supreme Court Rule 37.2(b) because it was only able to give

seven days notice to the parties of its intent to file its brief.

Given the succinct factual nature of the Institute's brief, the consent of the parties, and the absence of prejudice to any party,[1] the Institute respectfully requests that the Court grant leave to file its brief as *amicus curiae*.

Respectfully submitted,

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[1] Mr. Bender, counsel for Respondents, made counsel for *amicus curiae* aware that he was granted a 30-day filing extension by this Court and, as a result, is not prejudiced by the Institute's seven day notice.

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# BRIEF FOR THE GOLDWATER INSTITUTE, SCHARF-NORTON CENTER FOR CONSTITUTIONAL GOVERNMENT, AS *AMICUS CURIAE* SUPPORTING PETITIONERS

## INTEREST OF *AMICUS CURIAE*[1]

The Scharf-Norton Center for Constitutional Litigation is part of the Goldwater Institute, a tax exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. The Goldwater Institute was founded in 1988 to advance non-partisan public policies of limited government, economic freedom, and individual responsibility. The integrated mission of the Scharf-Norton Center for Constitutional Litigation is to preserve individual liberty by enforcing the provisions of the Arizona and federal Constitutions that directly and structurally protect individual rights, including the Bill of Rights, the doctrine of separation of powers and federalism. To ensure its independence, the Goldwater Institute neither seeks nor accepts government funds, and no

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation or submission of this brief. As explained above in the included Motion for Leave to File Brief as *Amicus Curiae*, notice could not be provided to the parties ten days prior to the due date for this brief because the Goldwater Institute did not decide to author this brief until seven days before its due date. Nevertheless, all parties were immediately notified by e-mail and USPS First Class mail of Goldwater's intent to file and the parties do not object to the filing of this brief. Consents are being filed concurrently with this brief.

single contributor may provide more than five percent of the Goldwater Institute's annual revenue on an ongoing basis.

This brief was primarily written by Matthew Ladner, Ph.D., Vice President of Research at the Goldwater Institute, with the assistance of counsel of record. The brief shares Dr. Ladner's knowledge and expertise in educational policy. Prior to joining the Goldwater Institute, Dr. Ladner was Director of State Projects at the Alliance for School Choice, where he provided support and resources for state-based school choice efforts. Dr. Ladner has written numerous studies on school choice, charter schools and special education reform. He is a graduate of the University of Texas at Austin and received both a Masters degree and a Ph.D. in Political Science from the University of Houston. Dr. Ladner previously served as director of the Center for Economic Prosperity at the Goldwater Institute and as Vice President of Policy and Communications at Children First America.

This case concerns *amicus* because the Goldwater Institute, through its Center for Educational Opportunity, works to advance innovative policy solutions to ensure that Arizona's students enjoy educational freedom and opportunity. This work includes hosting conferences, testifying at the State Capitol, and working with legislative and community leaders to promote a truly competitive, market-based, high quality educational system.

## SUMMARY OF THE ARGUMENT

Much like the system of school choice upheld by this Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), Arizona provides genuine opportunities for school choice consistent with this Court's uninterrupted line of precedent. Arizona's private school parental tax credits are a small component of a larger framework of school choice that includes a number of schooling options such as inter-district choice between public schools, intra-district choice between public schools, one of the nation's most liberal public charter school laws, a growing number of magnet school programs, and state funding for online learning. Arizona's tax credit program provides scholarships for children to attend both secular *and* religious private schools.

There is no factual support for the Ninth Circuit's conclusion that Arizona pressures parents into choosing religious private schools over all other diverse and readily available options. When the system is considered as a whole, it becomes clear that Arizona not only provides numerous non-religious schooling options for parents, it also funds these options at a much higher level than the indirect assistance provided to parents through the tax credit program. Arizona law does not compel parents to choose religious private schools. If anything, Arizona's policies skew heavily in favor of secular options.

## ARGUMENT

In the landmark case of *Zelman v. Simmons-Harris*, this Court held that the Cleveland Scholarship Program, a state funded voucher law, did not violate the First Amendment's Establishment Clause. In reaching this decision, the Court considered the full context of parental choice programs in Ohio. *Id.* at 653-60.

Likewise, when the full context of Arizona's parental choice programs is considered, it becomes clear that the tax credits at issue, A.R.S. § 43-1089, are merely a constitutional component of a larger system of "pure private choice." *See id.* at 650. The facts below reflect the reality that A.R.S. § 43-1089 in no way compels parents to send their children to religious private schools. Parents have many more secular options than sectarian options, and secular schools receive far more direct financial support from the State than sectarian private schools receive in aid from the tax credit program at issue.

### A. Children Are Not Forced into Private Schooling by the Challenged Tax Credit Program Because Arizona's K-12 Programs Give Parents Ample Choices Within and Between Public School Districts.

Arizona has a vibrant system of K-12 parental choice. State lawmakers adopted both inter- and intra- district choice programs for school districts in 1994. This law provides for state funds to follow

children to the public school of their choice, subject to the availability of space in each school. Although no systematic data exists compiling the number of students exercising inter- and intra-district choice, thousands of children utilize these programs.

The Gilbert Unified School District has over 3,000 out-of-district children attending, and the Mesa Unified School District has nearly 3,000 out-of-district children attending. Michelle Reese, *Education Choices Abound*, MESA TRIBUNE, March 10, 2010, *available at* http://dailyme.com/story/20100313000003053/education-choices-abound-arizona.html (last visited March 18, 2010). In addition, Arizona school districts created numerous magnet school programs, organized around a particular academic focus and without attendance boundaries. The State also funds online education courses, providing a new horizon of educational options for parents who wish to remain within the school district system. *See* Pat Kossan, *Arizona expands K-12 online learning*, ARIZ. REPUBLIC, September 24, 2009, *available at* http://www.azcentral.com/news/articles/2009/09/24/20090924onlineexpands0924.html (last visited March 18, 2010) (reporting that under a pilot program the state liberalized the provision of online courses for districts and charter schools statewide in 2009).

### B. Children Are Not Forced into Private Schooling by the Challenged Tax Credit Program Because Arizona's Public Charter Schools Provide Still More Options to Parents.

In addition to choices within and between school districts, Arizona has one of the nation's most liberal charter school laws. Charter schools are public schools that are governed by independent boards of directors and exempt from some aspects of state regulation. Funding for charter schools comes from the State on a per-child basis, and they have no geographically defined attendance boundaries. Arizona parents dissatisfied with their zoned district schools have numerous public charter school choices, including magnet schools, charter schools, cyber-charter schools and other district schools.

Almost a tenth of students attending public schools in Arizona now attend 566 charter schools, with new schools approved for operation every year. Charter school attendance has been strongly growing in Arizona, experiencing a 13% increase in aggregate enrollment during the 2008-2009 school year. Not only are charter school options ample, but parents take advantage of these options by sending their children to public charter schools despite the concurrent availability of private school tax credits. The facts do not support the conclusion that Arizona forcibly channels parents and children to private schools, much less sectarian private schools, through the challenged tax credit program.

### C. Children Are Not Forced into Private Schooling by the Challenged Tax Credit Program Because Arizona's Tax Credit Law Provides Substantially Less Aid to Parents Than Do Arizona's Public K-12 and Charter School Programs.

Arizona's tax credit law, A.R.S. § 43-1183, which aids children in attending both religious and secular private schools, provides a profoundly lower amount of aid per student when compared to the aid that follows students attending public schools. The Arizona Department of Revenue reports that the average scholarship was $1,909 per pupil in 2008. Ariz. Dep't of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2008*, http://www.azdor.gov/Portals/0/Reports/private-school-tax-credit-report-2008.pdf (last visited March 18, 2010). By comparison, the Joint Legislative Budget Committee of the Arizona legislature found that taxpayers granted a total estimated expenditure per pupil for public district school students of $9,698 per pupil in 2009. Joint Legislative Budget Comm., *K-12 Funding Since 2000 (All Funding)*, http://www.azleg.gov/jlbc/allfunding.pdf (last visited March 18, 2010). Unfortunately, the JLBC does not calculate an equivalent expenditure number for Arizona's 566 public charter schools, but we can calculate the total revenue per pupil number for Arizona public charter schools through information provided in the Arizona Superintendent of Public Instruction's Annual Financial Report. Specifically,

the 2009 Financial Report listed total revenue for all Arizona charter schools at $792,071,084. The same report lists the total Average Daily Membership (attendance) for Arizona charter schools as 99,018. Dividing total revenue by total enrollment results in a total revenue per pupil figure of $7,999 per pupil attending public charter schools.

In addition to the fact that aid to students attending public district and charter options is profoundly higher than the indirect subsidies provided by tax credits, the state provides aid to public schools on a guaranteed formulaic basis. As a thought experiment, imagine the situation reversed and public schools collected funds indirectly through a system of tax credits while private schools received direct per-capita subsidies from the state in much larger, guaranteed and predictable amounts. It would be a brazen religious school supporter indeed to stand up and cry foul by claiming that the state's system of tax credits for public schools *forced* children to attend public schools. Arizona's school funding system, in other words, profoundly favors attending district and charter schools. The notion that the tax credit system is forcing anyone to attend a private religious school is simply unsupportable, even laughable on its face.

### D. Children Are Not Forced into Private Schooling by the Challenged Tax Credit Program Because Arizona Fiscal Policy Promotes Public School Attendance.

Finally, the totality of Arizona's fiscal policy strongly favors public district school attendance over public charter school attendance, and by an *even wider margin* provides much greater assistance for those attending public schools than private schools. Parents must pay public school taxes even if they do their fellow taxpayers the service of placing them in a private school at their own expense. If parents decide to seek an education they find more suitable for their children at a private school, they effectively pay twice – once when they pay taxes, another when they pay tuition and fees. Arizona's modest tax credit program only partially addresses this inequity. Consequently, there is no question that Arizona's fiscal policy disadvantages parents who choose to place their children in private schools rather than public schools – and, for this very reason, the challenged tax credit program certainly does not evince an intention by the State to force children into private sectarian schools.

## CONCLUSION

Arizona does not force or coerce parents into using a tax credit scholarship, much less to send their children to sectarian schools. Therefore, the Ninth Circuit's decision needlessly threatens to impair parental choice as well as vital educational opportunities for Arizona's children. The data presented in this brief underscores that the Ninth Circuit's decision departs from vertical *stare decisis* by ignoring the "unbroken line of decisions" that culminated in *Zelman*'s holding. For these reasons, the Court should grant review.

Respectfully submitted,

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# Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, *et al.*,
*Petitioners,*

ARIZONA SCHOOL CHOICE TRUST, *et al.*,
*Petitioners,*

GALE GARRIOTT, in his official capacity as
Director of the Arizona Department of Revenue,
*Petitioner,*

*v.*

KATHLEEN M. WINN, *et al.*,
*Respondents.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF *AMICI CURIAE* JEWISH TUITION ORGANIZATION AND NEW WAY LEARNING ACADEMY IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICI CURIAE*[1]

*Amici curiae* Jewish Tuition Organization ("JTO") and New Way Learning Academy reflect the diversity of educational opportunities for children advanced by Arizona's private school tuition organization ("STO") tax credit, Ariz. Rev. Stat. Ann. § 43-1089 (West Supp. 2009), and endangered by the Ninth Circuit panel's opinion attacking that credit under the Establishment Clause.

The JTO is a 501(c)(3) Arizona non-profit corporation formed in 1999 to support Jewish day school education in the Phoenix metropolitan area. The JTO was organized by concerned members of the Jewish community, and its board consists of directors appointed by each of the participating day schools and a chair appointed by the Jewish Federation of Greater Phoenix.[2] Measured by contributions in 2008, the last year for which the Arizona Department of Revenue has published data, the JTO is the sixth-largest STO in Arizona. In

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of this brief are on file with the clerk, and counsel of record gave each party's attorney at least ten days' notice of the intent to file this brief.

[2] The JTO's participating schools currently include the East Valley Jewish Day School, the Jess Schwartz Jewish Community Day School, Pardes Jewish Day School, the Phoenix Hebrew Academy, Shalom Montessori, and Shearim Torah High School.

2008 it made need-based scholarship grants of nearly $2.2 million to approximately 390 students. The JTO's average grant in 2008 was $5,585, among the highest in the state.[3]

While some contributors to the JTO do not take the STO tax credit, most of the contributions are made by individuals who intend to take advantage of it, and the JTO solicits contributions on the basis of the tax credit. Without the JTO's tax credit-financed scholarships, hundreds of children each year would be unable to afford to continue in their schools.

New Way Learning Academy is Arizona's only non-profit, private K-12 school specializing in educating children with learning differences, including dyslexia, AD/HD, and other issues. Founded in 1968, the Scottsdale school, which has no religious affiliation, is approved by the Arizona Department of Special Education to serve students with learning disabilities, and its faculty includes certified special education teachers and reading specialists, a speech-language pathologist, an occupational therapist, and certified academic language therapists. New Way offers a student/staff ratio of 6:1 and develops individualized education plans carefully crafted around the student's educational needs and abilities as identified through

[3] *See* Arizona Department of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2008*, apps. 1-11 (2009) [hereinafter *ADOR 2008 Reporting*], *available at* http://www.azdor.gov/Portals/0/Reports/private school-tax-credit report-2008.pdf (last visited Mar. 15, 2010).

comprehensive assessments of speech/language skills, motor skills, and more.

New Way participates in New Valley Education Partners, an STO that grants scholarships to students who attend three non-religious Arizona schools: New Way, Tesseract School, and Verde Valley School. The cost of such specialized education is significant, and in 2008 twenty New Way students received need-based scholarships totaling over $204,000. *ADOR 2008 Reporting*, *supra* note 3, app. IV. The STO tax credit is crucial to New Way's ability to continue to provide unique educational opportunities for its students.

## SUMMARY OF ARGUMENT

The Ninth Circuit panel's opinion misapplies this Court's precedent in reinstating Respondents' Establishment Clause challenge to Arizona's thirteen-year-old STO tax credit. Contrary to the panel's opinion, Arizona STOs *enhance* the constitutionality of the tax credit by adding three more layers of *private* choice on top of the parents' own decision about where to educate their children. First, private citizens—including parents—create the STOs. Second, the private STOs then decide whether to provide scholarships at all private schools in Arizona or a subset of such schools. In doing so, many STOs adopt a wide variety of limiting principles for schools or scholarships: geography, special needs, culture, extreme financial need, pedagogical philosophy, shared non-sectarian school characteristics, self-selected school groupings, and, lastly, religious instruction. If existing STOs do not adequately serve the interests of particular groups of parents or schools,

then those groups can and do create new STOs to meet their needs.

Third, each STO must convince each taxpayer each year not only to take advantage of the tax credit, but also to contribute to that particular STO. Taxpayers considering whether to make a contribution face the burden of the float between the contribution in one year and the tax credit in the next. That float may be a high or even insuperable barrier to participation at any level, and the tax credit therefore operates in practice much like a tax deduction. The limiting principles on which some STOs operate, whether non-sectarian or sectarian, are critical to their efforts to persuade taxpayers that the causes and interests they represent—the students and schools they aid—are worthy of support.

This market of families, schools, taxpayers, and STOs consists entirely of private actors exercising private choices. When it comes to whether the children and the scholarship dollars will end up at religious or non-religious schools, the state is entirely neutral. Arizona has sought to enhance the quality of education by promoting competition among public and private schools of *all* kinds, not to establish religion.

The Court should grant certiorari at this time, rather than allowing further delay as this case, which is already ten years old, winds its way through the district court and court of appeals a third time, leaving thousands of children at immediate risk. Despite the technically interim procedural posture of the Ninth Circuit's decision, the facts concerning where the scholarship funds ultimately go are not in dispute, and there is no

additional evidence of legislative intent to be gleaned. The court of appeals' remand to the district court will be an empty exercise, and the doctrine of law of the case will likely control any future appeal from final judgment. Thus, the case will find its way back to this Court unchanged. In the meantime, the panel's opinion will cast a pall on STOs' ability to solicit contributions needed to fund scholarships for tens of thousands of elementary- and secondary-school students in Arizona private schools. This threat to the continuity of the education of children whose families have relied on STO-funded grants for as long as a decade, as well as to the viability of many private schools, makes the issues presented of urgent and compelling public importance.

## ARGUMENT

Petitioners have explained in their respective petitions how the panel's opinion conflicts with this Court's decisions in *Mueller v. Allen*, 463 U.S. 388 (1983), and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), as well as Arizona state court decisions upholding both the individual STO tax credit at issue here, *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 810, 921 (1999), and Arizona's more recently enacted corporate STO tax credit, *Green v. Garriott*, 212 P.3d 96 (Ariz. Ct. App.), *review denied* (Ariz. Oct. 27, 2009).[4] Instead of repeating that analysis, the JTO

[4] In 2006 the Arizona legislature enacted a tax credit for corporate contributions to STOs that fund scholarships for students whose family income does not exceed 185 percent of the income limit for federal reduced-price lunch programs, and who transfer from public to private school. Ariz. Rev. Stat. Ann. (Cont'd)

and New Way address how the Ninth Circuit panel's opinion misapprehends the tax credit's operation, finding a perceived government imprimatur on religious education in a scholarship system that operates completely as a matter of multi-tiered *private* choice in a competitive market of parents, contributors, private schools, and privately formed and operated STOs.

## I. THE STO TAX CREDIT PROGRAM PROVIDES ADDITIONAL LEVELS OF PRIVATE CHOICE THAT INSULATE THE TAX CREDIT FROM ESTABLISHMENT CLAUSE CONCERNS.

### A. STOs Enhance the Private Nature of Scholarship Grants.

The Ninth Circuit panel misplaced reliance on Respondents' allegation that most STO funds are available only for education at religious schools, thereby restricting parents' choice. This, the panel speculated, "could reveal the legislature's stated purpose in enacting Section 1089 to be a pretense." *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1012 (9th Cir. 2009) [hereinafter Panel Opinion]. Based on the range of parental choice alone, the panel compared the tax credit's operation unfavorably to the educational-expense deduction and direct voucher program at issue in *Mueller* and *Zelman*. *See id.* at 1015-16 & n.13; *Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649, 656

(Cont'd)

§ 43-1183(K) (West Supp. 2009). In addition to this credit, which was upheld in *Green*, in 2009 the Arizona legislature created a separate corporate tax credit for contributions to STOs that fund scholarships for children with disabilities or in foster care. Ariz. Rev. Stat. Ann. § 43-1184(Q)(3) (West Supp. 2009).

(9th Cir. 2009) (D.W. Nelson, Reinhardt, Fisher, JJ., concurring in denial of rehearing en banc) [hereinafter Panel Concurrence]. But in those cases, parental choice was particularly significant because it was the *only* operative avenue of private choice that channeled the government benefits.

In contrast, Arizona has further insulated educational choices from government involvement by structuring a program with multiple levels of private actors. In upholding the corporate STO tax credit, the Arizona Court of Appeals recognized that "[t]here are two distinct levels of private choice that 'direct the aid to religious schools or institutions of their choosing,': "the taxpayer" and "the scholarship recipient and his or her parents." *Green*, 212 P.3d at 102 (quoting *Zelman*, 536 U.S. at 649). In fact, there is also a third level of private choice: the STOs themselves.[5]

The creation and operation of the STOs reflect and interact with the choices of parents, schools, and contributors, who collectively express through a competitive marketplace what types of STOs exist and which schools they may from time to time support by making grants to matriculating students. The government is not involved at all in deciding which students will receive grants, much less which schools

[5] "Multiple layers of private, individual choice separate the state from any religious entanglement," and the government "is at least four times removed from any aid to religious organizations": "Individuals choose to create an STO. STOs choose to limit their funds to certain schools. Taxpayers choose to donate. Parents choose to apply for scholarships." 586 F.3d 658, 662, 670 (O'Scannlain, J., joined by Kozinski, C.J., Kleinfield, Gould, Tallman, Bybee, Bea, and N.R. Smith, JJ., dissenting from denial of rehearing en banc) [hereinafter En Banc Dissent].

they will attend. The government never even receives individualized reporting of grants, but only aggregate data for the STOs and schools. *See* Ariz. Rev. Stat. Ann. § 43-1089(F)(1)-(6) (West Supp. 2009).

Each of these tiers of private actors has equal constitutional significance in distancing the government from any perception of impermissible involvement in religious education, even if the different private actors may at times be perceived to act at cross-purposes by restricting one another's choices. As this Court noted in *Zelman*, "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement." 536 U.S. at 654-55. The Court did not suggest, as the panel asserted, that the "private individuals" who make the "private choice" must be parents. *Cf.* Panel Opinion, 562 F.3d at 1016, 1017 n.14. Consequently, if the vouchers to parents at issue in *Zelman* were constitutional because one level of private actors (parents) determined that the money would end up largely at religious schools, then *a fortiori* the same must be true of a system that involves multiple levels of private actors (parents, taxpayers, and STOs) who collectively make that determination. As eight Ninth Circuit judges poignantly asked below in dissenting from the denial of rehearing en banc, "How can *increasing* the separation between state and religion result in heightened government endorsement?" En Banc Dissent, 586 F.3d at 662.

The panel attempted to blur the distinction between these private actors and the state by using passive terminology[6] or by attributing the result to "how the Arizona Department of Revenue applies the statute." Panel Concurrence, 586 F.3d at 650, 651. But the state has "applied the statute" by maximizing private choice in the marketplace of educational ideas. To the extent that there are "incentives for parents to send their children to religious schools," *id.* at 653, they are not of the state's making.

### B. STOs Operate as Private Actors in a Competitive Marketplace for Contributors.

In law and in practice, the government does not fund STOs; private contributors do. The government does not make grants or disburse public money to STOs; it does not select the winners or losers. *See Kotterman*, 972 P.2d at 618 (holding that "no money *ever* enters the state's control as a result of this tax credit" and, "under any common understanding of the words, we are not here dealing with 'public money'"). Rather, the state's tax credit allows contributors to keep more of their own money, regardless of the means by which the tax consequences are calculated. As the Arizona Supreme Court noted, "It is far more reasonable to say that funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed to the

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[6] *E.g.*, Panel Concurrence, 586 F.3d at 650 ("Under the Arizona program . . ."); *id.* at 653 ("by allowing tax credits for contributions to discriminatory STOs"); *id.* at 658 (similar).

government, and upon which the state has a legal claim." *Id.*

The Ninth Circuit panel's fundamental mistake lay in viewing the STO tax credit as the functional equivalent of direct grants by the state to religious schools or even religiously oriented STOs, as if they, rather than the taxpayers, received the tax credit. *See* Panel Opinion, 562 F.3d at 1009-10. Its analysis hinged on drawing a hard-and-fast line between above-the-line tax deductions and below-the-line tax credits. *See id.* at 1008-10. In reality, with respect to both timing and government involvement in the disbursement of scholarship funds, the STO tax credit functions in the same manner, and subject to the same private market forces, as a tax deduction. *See Kotterman*, 972 P.2d at 612 (concluding that despite "mechanical differences," the distinctions between deductions and credits are not "constitutionally significant").

As with a tax-deductible contribution, those who wish to take advantage of the tax credit pay their money directly to the STO of their choice. To claim the credit, taxpayers must make their contributions by December 31. Only when they later file their tax returns—i.e., by April 15 or thereafter under an extension—may the taxpayers seek a credit by submitting Arizona Form 323. The state does not provide a check-off box for contributions on the tax return, allowing taxpayers to send their taxes to enumerated STOs rather than to the government. Instead, even if the taxpayers ultimately receive a full credit, they will have incurred

the cost of the months of float between when they make their contribution in the tax year and when they either pay reduced taxes with their return or, even later, receive a refund in the following year. The only ultimate difference between this credit and a deduction is the share of the actual contribution the taxpayer ultimately sees returned in lower taxes.

In light of, among other things, taxpayers' inertia, their philosophical preference for public school education, and the cost of the months of float between contribution and credit, STOs have to market the tax credit to convince taxpayers to exercise their private choice. This includes explaining how the tax credit operates and convincing taxpayers that private schools merit support. Moreover, in the same year that Arizona adopted the STO tax credit, it also adopted tax credits for contributions to public school extracurricular activities and character education programs, Ariz. Rev. Stat. Ann. § 43-1089.01 (West Supp. 2009), and to charitable organizations that help the working poor, Ariz. Rev. Stat. Ann. § 43-1088 (West Supp. 2009). While taxpayers may take each of these tax credits, financial constraints often put the STOs, public schools, and other organizations in effective competition for contributors, particularly as the calendar year comes to a close.

For these reasons, STOs commonly rely on a variety of marketing tools, including personal solicitations by volunteers or paid marketers; public speeches; tables at events; newspaper, magazine, theater-screen, and broadcast advertising; telephone banks; and pamphlets, fliers, mass mailings, and e-mail blasts. As with any system that relies on private choice, marketing is not

an easy task. It is particularly difficult in times of economic trouble, when the float proves for many or even most taxpayers to be an insuperable obstacle to contribution, even though the taxpayer's state income tax liability exceeds the maximum contribution and the taxpayer will eventually receive a dollar-for-dollar tax credit.[7] For this reason, the JTO saw its total contributions drop for the first time in 2008, and many other STOs experienced a similar economy-driven decline in revenues. *See ADOR 2008 Reporting*, *supra* note 3, app. I.

In addition to convincing taxpayers that private school education is a worthy cause in the abstract, each STO must convince contributors that it among all other STOs deserves support. Like all private choices, support for a particular STO and its professed mission can be fickle. Taxpayers frequently change from year to year whether they contribute to any STO, as well as which STO or STOs they will support. For example, approximately one fifth of the JTO's contributor pool turns over every year. Many taxpayers may split their contributions between different STOs in a single year, based on how the taxpayer values the choices made by the STO. "[N]othing in Section 1089 precludes any Arizona taxpayer, tomorrow, from suddenly deciding to fund exclusively secular STOs." En Banc Dissent, 586 F.3d at 664 n.12. In this ongoing struggle for taxpayer support, the state simply plays no role.

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[7] Thus, as a practical matter the panel erred in suggesting that "[a] tax-credit eligible contribution to an STO costs the taxpayer nothing." Panel Concurrence, 586 F.3d at 650 n.2.

### C. STOs Freely Choose Whether to Adopt Limiting Principles.

The STO tax credit in operation fulfills the secular purpose of "equalizing opportunities for Arizona's children" by, as its primary legislative sponsor explained, providing "an encouragement and incentive for citizens to donate to an organization they believe in."[8] Because citizens believe in different things, STOs do not come in one flavor, and the variety of STOs is not the result of government preference, but the fruit of private choice cross-pollinated among families, schools, and communities. STOs are created from time to time by private actors, free of government influence, to further the beliefs, priorities, and interests of a variety of other private actors, including parents, schools, and taxpayers themselves. Indeed, STOs have dramatically expanded in number: In 1999, the year before this litigation began, there were seventeen STOs in operation; in 2000 there were thirty; and today there are fifty-five. *ADOR 2008 Reporting*, *supra* note 3, at 3. As the dissent below accurately noted, "Anyone can form an STO, and there are no constraints on a taxpayer's ability to donate to an STO of his choice." En Banc Dissent, 586 F.3d at 659. In particular, parents "can create their own STO and solicit donations for use at secular private schools." *Id.* at 666. The formation of both the JTO and New Valley Education Partners illustrates these points.

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[8] Minutes of Mtg., H.R. Comm. on Educ., H.B. 2074, 43rd Leg., 1st Reg. Sess. 1 (Ariz. Jan. 29, 1997) (statement of Rep. Mark Anderson), *available at* http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/43leg/1R/comm_min/House/0129%2EED.htm (last visit-ed Mar. 18, 2010).

To the extent that some (but not all) STOs may limit the qualifying schools at which their scholarships may be used, that is in part because many STOs are created by the schools themselves for the benefit of the families who wish to send their children there. As a result, the diversity and size of STOs reflect the diversity and size of the school communities they support. The JTO, for example, was born in discussions among representatives of three Jewish schools about the need for a common fund that would avoid competition for contributors, and the idea was later supported by a broader community organization, the Jewish Federation of Greater Phoenix. In contrast, New Valley Education Partners, in which New Way participates, reflects the cooperation of three diverse non-religious schools that do not share common signature characteristics other than a commitment to quality education.

It is up to the STO itself how to define the students and schools it will directly or indirectly support. Some STOs support *all* children and *all* schools. Other STOs distinguish among children based only on whether the families demonstrate the level of financial need that the STO requires. (Petitioner Arizona School Choice Trust is of the latter type.) Many STOs thus support a broad range of schools that includes religious and non-religious institutions.[9]

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[9] Such STOs also include the Arizona Scholarship Fund (Arizona's third largest STO), https://www.azscholarships.org/index.aspx?c=73 (last visited Mar. 15, 2010); the Arizona Private Education Scholarship Fund, Inc., http://apesf.org/supported_schools (last visited Mar. 15, 2010); the Institute for Better Education, https://www.ibescholarships.org/index.aspx?c=80

(Cont'd)

In contrast, other STOs have chosen one or more distinctive limiting principles that may be religious or non-religious in nature. These limiting principles reflect private choices about what kinds of children to help, or what kind of schools or education to foster:

- **Geography:** An STO may focus geographically, soliciting contributors and supporting private schools in a particular area.[10]

- **Special Needs:** As in New Way's case, an STO, reflecting a school it supports, may focus on grants to children with special educational needs.

- **Culture:** An STO may focus on aiding students on a cultural basis rather than religious grounds.[11]

(Cont'd)
(last visited Mar. 15, 2010); and the Tuition Organization for Private Schools, https://www.topsforkids. com/index.aspx?c=60 (last visited Mar. 15, 2010).

[10] One example is the School Tuition Association of Yuma, Inc. *See* http://www.azstay.org (last visited Mar. 15, 2010).

[11] For example, Arizona Native Scholastic Enrichment and Resources provides for the educational needs of Arizona Native American youth and their tribes, and its "strategy is to prepare American Indian students for success in college by placing them in private high schools." http://ag.arizona.edu/pubs/general/azlp47 2/other_resources.html (last visited Mar. 15, 2010).

- **Extreme Need:** An STO may focus on families in the direst financial straits, such as the homeless.[12]

- **Pedagogy:** An STO may support schools that use a particular non-religious pedagogical approach, such as the Montessori method or Waldorf education.[13]

- **Shared School Characteristics:** An STO may support groups of schools based on shared non-religious characteristics, such as membership in a national school organization.[14]

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[12] The Maricopa County Schoolhouse Foundation provides scholarships for the children of homeless parents and other economically disadvantaged families. *See* http://www.mcschoolhousefoundation.org/pdf/tuitionTaxCreditForm2006.pdf (last visited Mar. 15, 2010).

[13] Examples include the Montessori Centre School Tuition Organization, http://www.montessorictr.org/Newsletters/Main/Newsletter%20September%202009.pdf (last visited Mar. 15, 2010); the Montessori Scholarship Organization, http://www.mklthejungle.org/mso-tax-credits.html (last visited Mar. 15, 2010); and the Arizona Waldorf Scholarship Foundation, http://www.tucsonwaldorf.org/Development_Tax_Credit.html (last visited Mar. 17, 2010).

[14] For example, the Arizona Independent Schools Scholarship Foundation supports need based scholarships to three non-religious Arizona schools that are members of the National Association of Independent Schools: Phoenix Country Day School, Green Fields Country Day School, and St. Gregory College Preparatory School. *See* http://www.aissf.org/aboutus.php (last visited Mar. 15, 2010).

- **School Groupings:** An STO may reflect the coordinated efforts of the self-selected group of schools that created it.[15]

- **Religious Instruction:** Finally, an STO may support schools that offer religious education, whether they reflect a particular movement or denomination or a broad range of beliefs.

The JTO, for example, chooses to support scholarships at Jewish day schools for families with financial need, and its staff and volunteer accountants work diligently to evaluate the financial need of applicants and make scholarship grants. Over more than a decade of operation, it has added additional or new participating day schools in response to parent or community requests.

In any event, as the dissent below observed, the majority of STOs—thirty out of fifty-five—do not limit their scholarships to students willing to attend religious schools. En Banc Dissent, 586 F.3d at 660 & n.6. Indeed, five of the ten largest STOs, including the third and fourth largest, have no religious affiliation. ADOR 2008 Reporting, *supra* note 3, app. I.

These limiting principles help motivate private parties to contribute to the STOs. In light of the

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[15] For example, the Orme-Primavera Schools Foundation provides scholarships to the Primavera School in Prescott and the Orme School in Mayer, both non-religious schools. *See* http://www.ormeprimavera schoolsfoundation.org (last visited Mar. 15, 2010).

inconvenience or hardship of the float, many or even most taxpayers may not be sufficiently moved by the idea of private-school education generally to support an all-children, all-schools approach. They are generally more inclined to give to STOs if they know their money will help children with particular financial or educational needs, or local schools, or their children's or friends' schools, or their own alma mater, or particular educational methods, or religious teaching.

But in every respect and at every level, those are purely private choices, not government policy. The government does not encourage STOs to adopt *any* limiting principles, much less religious ones, and it does not encourage taxpayers to contribute to a particular kind of STO. In making their philosophical and educational judgments, STOs operate in the same manner as private scholarship organizations that are funded solely by tax-deductible charitable contributions. They certainly exercise no governmental authority that could be analogized, as the panel did, to the state's delegation of the authority to veto liquor license applications in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). *See* Panel Opinion, 562 F.3d at 1020-21.

No reasonable observer would perceive any government favoritism toward a particular choice. As with tax-deductible contributions, the State of Arizona provides the playing field and makes neutral rules, but it then sits on the sidelines and does not root for any team. There is no sense in which, "from the perspective of the program's aid recipients, [the tax credit] 'deliberately skew[s] incentives toward religious schools.'" Panel Opinion, 562 F.3d at 1013 (quoting

*Zelman*, 536 U.S. at 650). The dissent below thus accurately noted that "the state's involvement stops with authorizing the creation of STOs and making tax credits available. After that, the government takes its hands off the wheel." En Banc Dissent, 586 F.3d at 660. "That is not government endorsement: that is government nonchalance." *Id.* at 662.

### D. Scholarship Funds Flow to Religious Schools Only Because They Follow Parents' Demand.

The Ninth Circuit panel's reliance on how the scholarships ultimately are awarded from year to year is both legally erroneous and factually misguided. As a legal matter, this Court has at least twice rejected rules that would evaluate facially neutral laws under the Establishment Clause based on who benefits from time to time, which is necessarily a moving target. *See Zelman*, 536 U.S. at 657 ("attribut[ing] constitutional significance" to a high percentage of participating religious schools "would lead to the absurd result that a neutral school-choice program might be permissible" in some areas or states but not others); *Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").

As a factual matter, money tends to end up in private religious schools because they outnumber private non-religious schools. That is hardly surprising, because the State of Arizona has dramatically enhanced the variety of non-religious options available in *public*

schools. *See Zelman*, 536 U.S. at 655-56 (holding that Establishment Clause question "must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school").

For example, in 1994—three years before the STO tax credit was enacted—the Arizona legislature authorized charter schools to "provide additional academic choices for parents and pupils" and "serve as alternatives to traditional public schools." Ariz. Rev. Stat. Ann. § 15-181(A) (West 2009). Such public schools operate independently of the local school district and reflect a variety of educational philosophies.[16] There are charter schools that focus on "great books" (the Great Hearts Academies), other educational methods (the Montessori Charter School of Flagstaff), the arts (the Arizona School for the Arts), the sciences (the Academy of Math and Science), and a variety of other needs and target communities. Of the more than 4,000 charter schools in the United States, 502 are in Arizona; they represent a quarter of all public schools in the state, and enroll over 101,000 students—ten percent of Arizona's public school population.[17]

In addition, in 1995 the Arizona legislature mandated an "open enrollment policy" in public schools

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[16] *See* Arizona Department of Education, *Charter School Search*, http://www.ade.state.az.us/charterschools/ (last visited Mar. 15, 2010) (list of charter schools).

[17] *See* Arizona Charter Schools Association, *About Arizona Charter Schools*, http://www.azcharters.org/pages/schools-basic-statistics (last visited Mar. 15, 2010).

in order to expand parental choice. *See* Ariz. Rev. Stat. Ann. § 15-816.01(A) (West Supp. 2009). As an example of the choices now available, some public school districts themselves offer "traditional academies" that use different curricula and instructional methods.[18]

This range of options is critical in at least two ways. First, there is no evidence for the panel's suggestion that the Arizona legislature attempted through the STO tax credit to advance religion. *See, e.g.*, Panel Concurrence, 586 F.3d at 657-58. Rather, Arizona has sought to advance the secular goal of improving the quality of education by expanding educational options of *all* kinds. It has promoted competition among public schools (whether district or charter), among private schools, and between public and private schools. The Arizona Constitution's Aid Clause, however, prohibits direct government aid to *any* private schools, whether or not religious. *See* Ariz. Const. art. IX, § 10; *Cain v. Horne*, 202 P.3d 1178, 1182-84 (Ariz. 2009) (invalidating voucher program because "[t]he Aid Clause prohibits the use of public funds . . . to aid *private* or sectarian schools"). The Arizona Supreme Court held in *Kotterman* that the Aid Clause did not prohibit tax credits for private contributions. 972 P.2d at 617-21. The tax credit program therefore was necessary to support private educational options of any and all kinds, and Arizona has now enacted several credits for that purpose. *See supra* note 4.

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[18] *See, e.g.*, Chandler Traditional Academy, http://www.mychandlerschools.org/200920981408243/blank/browse.asp?A=383&BMDRN=2000&BCOB=0&C=68508 (last visited Mar. 15, 2010).

Second, given the opportunities to attend innovative publicly funded district or charter schools on a tuition-free basis, or even to start a charter school rather than a private school,[19] it is to be expected that most students or educational innovators interested in non-religious education will end up in public schools. *See* Erica Schacter Schwartz, *Why Pay for Religious Schools When Charters Are Free?*, Wall St. J., June 12, 2009, at W13 ("This mix of charter and after-school tutorial is the model that presents a real challenge to private, religiously focused day schools.").

It is also to be expected that private schools will tend to be those that offer what public schools cannot. In some cases, private schools may provide non-religious education of a specialized kind; *amicus* New Way, for example, focuses on serving students with learning differences. In other cases, private schools may provide religious education. *See Zelman*, 536 U.S. at 656-57 ("Cleveland's preponderance of religiously affiliated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities."). Thus, roughly three-quarters of Arizona's private schools are religious[20] and, consistent with that fact, Respondents alleged below that "75% of the scholarship funds granted by STOs in 1998 were granted to students attending religious schools, and 79% of the

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[19] *See* Arizona Charter Schools Association, *Start Your Charter School*, http://www.azcharters.org/CharterStarter (last visited Mar. 15, 2010).

[20] *See Kotterman*, 972 P.2d at 626 (Feldman, J., dissenting) ("At least seventy-two percent of [Arizona nongovernmental] schools are sectarian.").

schools receiving scholarships were religious schools." 9th Cir. Excerpts of Record 4. STO funds have thus followed the students and the schools as a matter of private choice, not government policy. The results of private choices do not provide grounds for invalidating the tax credit under the Establishment Clause.

The panel argued that "taxpayers, rather than parents, direct funds to religious organizations" and thereby limit parents' choices to send their children to non-sectarian schools, Panel Concurrence, 586 F.3d at 650, 652, but this assertion fails to appreciate the role of parents in determining which STOs receive money in the first place. Parents are critical to starting many STOs, convincing STOs to add schools to approved lists, and directing contributions to STOs that support the schools of their choice. They do this not only by contributing themselves to STOs, but also by convincing family members, friends, neighbors, and co-workers to contribute. They also man the STOs' marketing efforts: working tables at events, passing out fliers, staffing phone banks.

In the end, many STOs give all or sizeable portions of their scholarship funds to students at religious schools because the families *prefer* to send their children to those schools, and help direct taxpayer contributions to STOs that can fund those preferences. Parents are not the passive victims of others' choices—much less the choices of any state actors—but rather are the engine of choice by the students, the schools, the STOs, and the taxpayers.

## II. IT IS URGENT THAT THE COURT GRANT CERTIORARI NOW.

This Court should grant certiorari and review the Ninth Circuit panel's opinion at this juncture, as any delay will put at risk the education of thousands of children throughout Arizona. For over a decade, parents and schools have relied on tax credit-funded scholarships awarded by STOs, and over 28,000 students currently receive scholarships. They have done so with the security of knowing that the STO tax credits have been consistently upheld by Arizona and federal courts since the *Kotterman* decision in 1999. Many of the children have attended their current schools for their entire academic lives, and they have no effective alternatives for staying in those schools. Most STOs rely almost exclusively on contributions by taxpayers who anticipate taking the tax credit. Without the tax credit, many schools will wither and some will die, and even if the schools survive many children will be unable to afford them.

Though the Ninth Circuit panel's decision is by nature interim, it casts a pall over the tax credit and the scholarships it funds. Many taxpayers already accept the burden of the float, and they will be asked also to accept an unwarranted risk that the panel's opinion will retroactively impose higher tax liabilities (unless the STOs agree to return contributions that likely have already been paid out in grants). Unless this Court grants certiorari now, the natural result of the Ninth Circuit panel's opinion will be to depress the level of contributions this year and for years after, even if the tax credit is ultimately upheld.

Moreover, as the dissent noted, despite "the procedural posture of this decision" and the remand to the district court, "no one disputes plaintiffs' factual allegations about how the program operates in practice," and the remand will be "little more than an empty formality." En Banc Dissent, 586 F.3d at 661 n.7. A future Ninth Circuit panel likely will consider itself bound by the law of the case, leaving only this Court to correct the current panel's error on a new set of petitions for certiorari, with nothing changed. To avoid this, the Court should review these issues now.

## CONCLUSION

The petitions for certiorari should be granted.

Respectfully submitted,

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Nos. 09-987, 09-988, 09-991

In the
# Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, et al.

*Petitioners,*

v.

KATHLEEN M. WINN, et al.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

1. Arizona Revised Statute (A.R.S.) section 43-1089 (Section 1089) is a facially neutral program of private choice in education. Most taxpayers who contribute to school tuition organizations under Section 1089 contribute to organizations that award scholarships to students attending religious schools. Did the Court of Appeals err in holding that Section 1089 has the purpose and effect of advancing religion in violation of the Establishment Clause, when the State does nothing to influence the taxpayers' or the school tuition organizations' choice?

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## INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioners.[1]

PLF is a nonprofit, tax-exempt foundation incorporated under the laws of the State of California, organized for the purpose of litigating important matters of public interest. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF is headquartered in Sacramento, California, and has offices in Washington, Florida, and Hawaii. PLF has participated as amicus in many cases involving kindergarten through 12th grade (K-12) education reform including *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *Wells v. One2One Learning Found.*, 141 P.3d 225 (Cal. 2006); and *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745 (Cal. Ct. App. 1999).

This case raises important issues of constitutional law as well as important policy considerations in the realm of K-12 education. Amicus believes that its

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court in its deliberations.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Eight years ago in *Zelman* this Court held a school choice program constitutional where the state gave tuition aid directly to parents that the parents could then use to cover tuition expenses at public or private schools. *Zelman*, 536 U.S. at 645-46, 663. The *Zelman* Court emphasized that the independent private choices of parents shielded the program from an Establishment Clause violation. *Id.* at 652. The existence of independent choice by nongovernment actors shows that the government is remaining neutral toward religion, and is not "respecting an establishment of religion" as prohibited by the First Amendment. U.S. Const. amend. I.

Ariz. Rev. Stat. § 43-1089 (Section 1089) provides for scholarships to students "to attend any qualified school of their parents' choice." Ariz. Rev. Stat. § 43-1089(H)(3). Unlike *Zelman*, however, the state does not give state funds directly to parents. Instead, Section 1089 creates a multi-faceted scheme whereby money can go to a sectarian school only if: (1) a Student Tuition Organization (STO) is created that independently chooses to provide scholarships to religious schools; (2) multiple taxpayers independently decide to donate a small ($500) amount to that STO in order to claim a tax credit; and (3) parents independently choose to apply for (and the STO grants) a scholarship for a student to attend a private, religious school. *See* Ariz. Rev. Stat. § 43-1089. Thus,

Section 1089 requires that numerous individuals make independent private choices before any donations (which are then claimed for tax credits) end up in sectarian schools. The independent choices here are significantly greater than were present in *Zelman*, and ensure that no one would consider that the State of Arizona directly funds religion.

While independent choice is fundamental to this Court's Establishment Clause jurisprudence, the freedom to choose also underscores the important policy implications of this Court's decision. All too often, government-run public schools provide a one-size-fits-all model to education. Conversely, school choice programs create incentives for schools to improve, and once choice is injected into state education systems, the positive results are dramatic. As a result of choice, programs throughout the country have improved student achievement and graduation rates almost universally. Moreover, school choice programs provide incentives for specialized schools that can care for those children most in need of increased attention and differentiated instruction. This is of particular importance in Arizona, where its state supreme court recently struck down a different school choice program designed to help the state's most needy children. *See Cain*, 202 P.3d 1178. In addition, school choice programs throughout the country save taxpayers millions of dollars. When schools compete for students, private schools in a competitive environment will spend more resources on instructional materials and less on bureaucracy. With states throughout the country facing severe budget deficits, the money saved from school choice programs cannot be discounted.

Section 1089 allows choice into Arizona schools. Throughout the country, where choice in education is present, parents, children, and taxpayers benefit. Section 1089 provides hope to thousands of Arizona families and this Court's decision will encourage other states to implement similar programs nationwide. Because Section 1089 requires independent choices from parents, taxpayers, and STOs before any money goes toward a religious school, it is neutral toward religion. This Court should therefore reverse the decision of the Court below.

## ARGUMENT

### I

### SCHOOL CHOICE PROGRAMS THAT REQUIRE INDEPENDENT CHOICES BY NON GOVERNMENT ACTORS ARE NEUTRAL WITH RESPECT TO RELIGION

This Court has long recognized that the First Amendment requires the government to remain neutral toward religion.

> That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

*Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1, 18 (1947).

> [T]he [neutrality] principle is well grounded in our case law, as we have frequently relied explicitly on the general availability of any

> benefit provided religious groups or individuals in turning aside Establishment Clause challenges.

*Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994).

In *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995), this Court noted that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." Also, in *Agostini v. Felton*, 521 U.S. 203, 231 (1997), this Court emphasized that a program does not create a financial incentive to undertake religious education where "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." And in *Mitchell*, a plurality of this Court observed that "we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." 530 U.S. at 809 (plurality opinion).

When determining whether programs are neutral toward religion, the presence of independent choice by nongovernmental actors makes programs more likely to have the requisite neutrality. Indeed, this Court routinely emphasizes the importance of independent choice when deciding Establishment Clause challenges. *See, e.g.*, *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) ("[T]he statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents,"); *Mueller v. Allen*, 463 U.S. 388, 399 (1983) ("[P]ublic funds become available [to

sectarian schools] only as a result of numerous private choices of individual parents of school-age children."); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986) ("[A]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.").

In *Mitchell*, both the plurality opinion and the concurring opinion stressed the importance of independent choice. Both opinions noted that governmental aid is permissible when, as the concurrence puts it, "the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use." *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring) (citing *Witters*, 474 U.S. at 488; *Zobrest*, 509 U.S. at 10). In these circumstances, "any aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring) (citation omitted).

Much of the briefing in this case centers around the proper interpretation of *Zelman*, 536 U.S. 639. On the question of neutrality and choice, however, this Court was clear:

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

> A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.

*Zelman*, 536 U.S. at 652.

The court below recognized the importance of independent private choice. *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1015 (9th Cir. 2009). Yet, had the court below properly considered the interplay between neutrality and independent choice, Section 1089 would have survived constitutional scrutiny. Programs that require independent choices by nongovernment actors before any dollars can be accepted by a religious institution, satisfy the Establishment Clause's neutrality requirement. Indeed, what distinguishes this case from *Zelman* is the multiplicity of independent private choices that occur before a sectarian school provides a scholarship to any student. In his dissent to the denial of rehearing en banc, Judge O'Scannlain summarized the layers of choice inherent in Section 1089.

> Multiple layers of private, individual choice separate the state from any religious entanglement: the "*government itself*" is at least four times removed from any aid to religious organizations. First, an individual or group of individuals must choose to create an STO. Second, that STO must then decide

> to provide scholarships to religious schools. Third, taxpayers have to contribute to the STO in question. Finally, parents need to apply for a scholarship for their student.

*Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649, 662 (9th Cir. 2009) (en banc) (O'Scannlain, J., dissenting).

The intent of Section 1089 was to provide "equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents." *Winn*, 562 F.3d at 1012. Participation in Section 1089's scholarship program by both schools and school tuition organizations is based entirely on religiously neutral criteria. Ariz. Rev. Stat. § 43-1089(H)(2) & (3). No preference for religious schools is given; no preference for secular schools is given. *Id.*

Moreover, it is only through the "independent and private choices" of parents, school tuition organizations, and taxpayers that any government aid flows to a religious school. STOs decide what type of schools they want to support. Taxpayers decide which STOs they want to direct their money towards. Parents decide whether to apply for a scholarship from an STO. Because taxpayers and parents independently direct the flow of scholarships, public funds ultimately reach individual schools only as a result of the "genuinely independent and private choices" of multiple nongovernment actors. *See Zelman*, 536 U.S. at 651 (citing *Witters*, 474 U.S. at 487). This Court has consistently held that when "aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval,' can be deemed to have been conferred on any

particular religion, or on religion generally." *Mueller*, 463 U.S. at 399 (citing *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)); *see also Zelman*, 536 U.S. at 652.

Amicus believes that a school choice program that provides for the participation of all school children, allows taxpayers to fund the STO of their choice, and enables parents to apply to the STO of their choice, is entirely consistent with this Court's principles of neutrality and independent choice. Since this Court's landmark decision in *Zelman*, states across the country have been experimenting with different methods of increasing choice throughout their educational systems. The continued livelihood of many of these programs is dependent upon this Court's decision. This Court should reverse the court below, and reaffirm that the principles of neutrality and independent choice underscore its Establishment Clause jurisprudence.

## II

## WHEN CHOICE IS UNLEASHED IN EDUCATION, PARENTS, STUDENTS, AND TAXPAYERS REAP THE BENEFITS

Americans take advantage of choice every day, from which grocery store to patronize to which university to attend; those businesses strive to please their customers. However, unlike grocery stores and other important services that affect Americans on a daily basis, the current public education system often locks students into particular schools based solely on students' addresses. This system does not allow many options for parents when schools underperform or fail to meet their children's needs. *See generally* Greg Forster, *A Win-Win Solution: The Empirical Evidence*

*on How Vouchers Affect Public Schools*, The Friedman Foundation for Educational Choice, Feb. 2009, at 11 (Forster Article).[2] Though wealthy parents can move to another area or pay for private school tuition out of pocket, these options are not available to students from impoverished backgrounds. *Id.*

In dissent to the denial rehearing en banc here, Judge O'Scannlain recognized that the lower court's ruling could severely limit the availability of school choice options in states throughout the country.

> I dissent . . . because . . . the panel's holding casts a pall over comparable educational tax-credit schemes in states across the nation and could derail legislative efforts in four states within our circuit to create similar programs. In short, the panel's conclusion invalidates an increasingly popular method for providing school choice, jeopardizing the educational opportunities of hundreds of thousands of children nationwide.

*Winn*, 586 F.3d at 659 (en banc) (O'Scannlain, J., dissenting). Indeed, school choice is already playing an important role in solving this country's educational crisis by encouraging competition, increasing academic achievement, and lowering educational costs. At the beginning of 2009, there were already 24 school choice programs in 14 states and Washington, D.C. Forster Article at 10. "Over 160,000 students use these programs to attend private schools using public

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[2] *Available at* http://www.edchoice.org/Research/Reports/A-Win-Win-Solution----The-Empirical-Evdence-on-How-Vouchers-affect-Public-Schools.aspx (last visited Aug. 2, 2010).

funds," and these programs have shown dramatic success in the areas including parental benefits, student achievement, and lower educational costs. *Id.* To be sure, no two school choice programs are alike, but they are united in providing choice to parents who are otherwise locked into the public school in their geographical area. Indeed, Judge O'Scannlain recognized the similarity between Section 1089 and the "tax-credit schemes" in place (and being proposed) in numerous states throughout the country. *Winn*, 586 F.3d at 659 (en banc) (O'Scannlain, J., dissenting) (citing Fla. Stat. § 220.187; Ga. Code Ann. § 48-7-29.16; Ind. Code § 6-3.1-30.5; Iowa Code § 422.11S; 24 Pa. Stat. Ann. § 20-2005-B; R.I. Gen. Laws § 44-62-2; A.B. 279, 2009-10 Leg., Reg. Sess., § 1 (Cal. 2009); S.B. 342, 61st Leg., Reg. Sess., § 1(3)(b)-(c) (Mont. 2009); S.B. 289, 75th Leg., Reg. Sess., § 6(1) (Nev. 2009); H.B. 2754, 75th Leg., Reg. Sess. (Or. 2009)).

Without parental choice, schools "lack the positive incentive for better performance that most other types of service institutions take for granted." Forster Article at 11. Just as monopolies "provide poor quality because they have little incentive to serve their clients well[,]" so too, education services and schools' responsiveness to consumer demand deteriorates when suppliers are isolated from consumer preferences. *Id.* at 12. School choice programs break that monopoly, giving parents options and mobility, thereby disciplining inadequate schools and encouraging them to create a better learning environment for students. Thus, even public school students without vouchers benefit from school choice because these programs create competition among the existing public schools.

Therefore, it is unsurprising that school choice programs are very popular with parents. On the Florida Department of Education's website, parents have presented personal accounts of the way school choice has changed their lives. *See* Florida Department of Education, Office of Independent Education & Parental Choice, Scholarship Success Stories.[3] Some speak to the satisfaction that comes with selecting schools that suit their children's needs. *Id.* Other parents focus on their children's academic improvement, or how for the first time, students began to talk about college and their futures. *Id.* One pleased parent of a child in a Florida voucher program emphasized that school choice creates a system where educational decisions are in the hands of families—so parents "could no longer place the blame on others." *Id.*

### A. School Choice Improves Students' Academic Achievement

School choice has been credited with improving academic achievement in K-12 education in locations across the country. In ten studies of school choice program cities across the nation[4], researchers used

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[3] *Available at* http://www.floridaschoolchoice.org/Information/success_stories/scholarships.asp (last visited Aug. 2, 2010).

[4] *See* The Foundation for Educational Choice, *Erasing the Myths of School Choice*, Feb. 28, 2009, *available at* http://www.edchoice.org/Research/Reports/Erasing-the-Myths-of-School-Choice.aspx (last visited Aug. 2, 2010); Jay Greene, Paul Peterson, & Jiangtao Du, *School Choice in Milwaukee: A Randomized Experiment* in *Learning from School Choice* (Paul Peterson & Bryan Hassel eds. 1998); Cecilia Rouse, *Private School Vouchers and Student Achievement*, 113 Q. J. of Econ. 553 (May 1998), *available at* http://ideas.repec.org/p/pri/indrel/750.html (last visited Aug. 2, (continued...)

random-assignment methods to select students to receive an educational voucher. The results were unmistakable. For example, in *Erasing the Myths of School Choice*, researchers compared the progress of voucher students with a control group of students over periods from one to four years. The Foundation for Educational Choice, *Erasing the Myths of School Choice*. Researchers then randomly assigned which students received vouchers and which did not, while controlling for external factors such as previous academic achievement. *Id.* The voucher students routinely showed better academic outcomes than the control group. *Id.* More, the studies revealed no negative effects for voucher students. *Id.* In all but one, the positive results demonstrated, with a high level of statistical certainty, that the improved student achievement of all or most students was not mere coincidence, but instead directly correlated to the use of vouchers. *Id.* Reading and math levels increased

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[4] (...continued)
2010); Jay Greene, *Vouchers in Charlotte*, Education Next (Summer 2001), *available at* http://educationnext.org/files/ednext20012_46b.pdf (last visited Aug. 2, 2010); William Howell & Paul Peterson, *The Education Gap*, Brookings Institution Press, 2002 (revised 2006); John Barnard, et al., *Principal Stratification Approach to Broken Randomized Experiments: A Case Study of School Choice Vouchers in New York City*, 98 J. Am. Statistical Assoc. 299 (June 2003), *available at* http://biosun01.biostat.jhsph.edu/~cfrangak/papers/sc/vouchers.pdf (last visited Aug. 2, 2010); Alan Krueger & Pei Zhu, *Another Look at the New York City School Voucher Experiment*, 47 Am. Behav. Scientist 658 (Jan. 2004), *available at* http://ideas.repec.org/p/nbr/nberwo/9418.html (last visited Aug. 2, 2010); Joshua Cowen, *School Choice as a Latent Variable: Estimating the "Complier Average Causal Effect" of Vouchers in Charlotte*, 36 Policy Studies J. 301 (Nov. 2007), *available at* http://www3.interscience.wiley.com/journal/119400330/abstract?CRETRY=1&SRETRY=0 (last visited Aug. 2, 2010).

anywhere from five to eleven points compared to the control groups without vouchers. *Id.* Undoubtedly, some subgroups benefitted more than others from the voucher program (for example black students or students scoring below the city median generally showed more improvement). Nevertheless, half of the studies evidenced improvement for all voucher students. *Id.*

Moreover, numerous empirical studies[5] demonstrate how vouchers have improved Milwaukee public schools. In a 2002 study using a regression analysis of the Milwaukee voucher program, researchers found that "greater exposure to vouchers had a positive effect on year-to-year changes in public school outcomes." Forster Article at 17. That study found that the positive effect of exposure to vouchers was so strong that a school with all its students eligible for vouchers could be "expected to outperform a school

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[5] Caroline Minter Hoxby, *Rising Tide*, Education Next, Hoover Institution (Winter 2001), *available at* http://www.heartland.org/custom/semod_policybot/pdf/17457.pdf (last visited Aug. 2, 2010); Jay Greene & Greg Forster, *Rising to the Challenge: The Effect of School Choice on Public Schools in Milwaukee and San Antonio*, Civic Bulletin, Manhattan Institute (Oct. 2002), *available at* http://www.manhattan-institute.org/pdf/cb_27.pdf (last visited Aug. 2, 2010); Rajashri Chakrabarti, *Impact of Voucher Design on Public School Performance: Evidence from Florida and Milwaukee Voucher Programs*, Staff Reports 315, Federal Reserve Bank of New York (Jan. 2008), *available at* http://ideas.repec.org/p/ecm/nasm04/221.html (last visited Aug. 2, 2010); Rajashri Chakrabarti, *Can Increasing Private School Participation and Monetary Loss in a Voucher Program Affect Public School Performance? Evidence from Milwaukee*, 92 J. Pub. Econ. 1371 (June 2008), *available at* http://ideas.repec.org/p/wpa/wuwppe/0512003.html (last visited Aug. 2, 2010).

with only half its students eligible by 15 percentile points over four years." *Id.*

In the Edgewood school district in San Antonio, Texas, where 93% of the students were eligible for lunch programs and where the district had a 97% Hispanic population, researchers used a program that provided vouchers for every student in the district. Greene & Forster, *Rising to the Challenge*, at 6. They found that Edgewood's "year-to-year test score gain outperformed those of 85 percent of school districts in Texas." *Id.* Researchers concluded that where strong competition from private schools was present, that "private schools . . . [drove] public school improvements." *Id.* at 7.

Graduation rates are also positively affected by school choice programs. In June, 2010 the U.S. Department of Education released its latest report on D.C.'s Opportunity Scholarship Program (OSP); researchers found that the offer of an OSP scholarship increased students' probability of completing high school by 12 percentage points overall. *See* Patrick Wolf, et al, *Evaluation of the DC Opportunity Scholarship Program: Final Report*, U.S. Department of Education Institute of Education Sciences, National Center for Educational Evaluation and Regional Assistance (2010).[6] The graduation rate was 82% for the group that had been offered vouchers, compared to 70% for the control group. *Id.* at 41. Additionally, the offer of an OSP voucher improved the graduation prospects of students by 13 percentage points. *Id.* at 41.

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[6] *Available at* http://ies.ed.gov/ncee/pubs/20104018/index.asp (last visited Aug. 2, 2010).

### B. Special Needs Students Benefit from School Choice

Section 1089 specifically recognizes that STOs can be used to benefit special needs students. *See* Ariz. Rev. Stat. § 43-1089(H). Until last year, Arizona had a separate voucher program designed specifically for special need students. *See* Ariz. Rev. Stat. § 15-891 *invalidated by Cain*, 202 P.3d at 1185. The Arizona legislature, through its efforts with Section 1089 and the program struck down in *Cain*, have demonstrated a strong commitment to improving the educational circumstances of special needs students through vouchers.

As seen in numerous studies using random assignment methods, special needs students can benefit greatly from school choice programs. For instance, the McKay Scholarships for Students with Disabilities Program, afforded over 20,500 disabled Florida students the opportunity to attend a private school during the 2008-09 school year. Disabilities covered under the McKay program include K-12 students who are documented as having an intellectual disability; a speech or language impairment; a hearing impairment, including deafness; a visual impairment, including blindness; a dual sensory impairment; an emotional or behavioral disability; a specific learning disability, including, but not limited to, dyslexia, dyscalculia, or developmental aphasia; a traumatic brain injury; a developmental delay; or autism spectrum disorder.

Researchers have compared special education services provided by public and private schools. In a study conducted by the Center for Civic Innovation at the Manhattan Institute, researchers compared the

services for participants in the McKay voucher program in both their private and public institutions. Jay P. Greene & Greg Forster, *Vouchers for Special Education Students: An Evaluation of Florida's McKay Scholarship Program*, Center for Civic Innovation at the Manhattan Institute, Civic Report No. 38, June 2003.[7] Parents reported dramatically higher rates of satisfaction with their children's academic progress: 93% were satisfied with the McKay school verses 33% who were satisfied with their previous public school. *Id.* at 4. One reason for the difference in satisfaction levels may be because two-thirds of families reported that public schools failed to provide all of the special education services that they were required to provide by law, while only 12% reported that private schools did not provide services which they had promised to provide. *Id.* at 7.

This study also shows fewer instances of victimization and behavior problems in private schools than public schools. In public schools, nearly 47% of students were ridiculed for their disabilities and almost 25% were physically assaulted. *Id.* at 9. Conversely, the private schools showed only 5% who were bothered and 6% who were assaulted. *Id.* Similar programs for special needs students are in place in Georgia, Ohio, and Utah.

### C. School Choice Lowers Educational Costs

School choice provides students with quality educations at a fraction of the cost. From 1990 to 2006, the nation's school choice programs saved a total of

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[7] *Available at* http://www.manhattan-institute.org/html/cr_38.htm (last visited Aug. 2, 2010).

$422 million for local school districts and $22 million for state budgets. Susan Aud, *Education by the Numbers: The Fiscal Effect of School Choice Programs, 1990-2006* (Apr. 2007), The Friedman Foundation for Educational Choice, Executive Summary.[8] Additionally, schools in choice programs generally operate on a tighter budget than district schools do, receiving from the government only about 80% per pupil of the amount received by district schools. Chester E. Finn, et al., *Charter School Funding: Inequity's Next Frontier*, Thomas B. Fordham Institute, Fordham Foundation, at Major Findings (2005).[9] In many states benefitting from school choice, local districts can retain a portion of funding which they would have spent on the students in choice programs; those extra tax dollars can be spread across the remaining public school students when enrollment declines take place. *See* Jay Greene, et al., *Expanding Choice in Elementary and Secondary Education*, Brown Center on Education Policy at the Brookings Institute (Feb. 2, 2010).[10]

In a Goldwater Institute study from 2005, analysts found that absent private schools, the State of Arizona and localities would have had to spend an additional $260 million during the 1999-2000 school year to educate the more than 44,000 children who

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[8] *Available at* http://www.heartland.org/custom/semod_policybot/pdf/21956.pdf (last visited Aug. 2, 2010).

[9] *Available at* http://www.defendcharterschools.org/CharterSchoolFunding.pdf (last visited Aug. 2, 2010).

[10] *Available at* http://www.brookings.edu/~/media/Files/rc/reports/2010/0202_school_choice/0202_school_choice.pdf (last visited Aug. 2, 2010).

reduced necessary public school expenditures by attending private schools. Ross Groen & Vicki Murray, *Survey of Arizona Private Schools: Tuition, Testing, and Curricula*, Goldwater Institute Policy Report No. 199, at 16 (Jan. 5, 2005).[11] The study estimated, that from 2004 through 2016, if private schools continued to educate just 5% of the state's K-12 population, roughly 660,000 students would not have to be educated in public schools, saving the state roughly $2.6 billion. *Id.* at 18. The study noted that the savings from just one child beginning and completing their K-12 education in a private school could save the state and local governments nearly $100,000 over 13 years. *Id.*

In a related study, the Goldwater Institute conducted a survey of 325 private schools of which nearly 150 responded. Andrew J. Coulson, *Arizona Public and Private Schools: A Statistical Analysis*, Goldwater Institute Policy Report No. 213, Goldwater Institute (Oct. 17, 2006).[12] The survey showed that Arizona private schools spent $5,545 per pupil, more than $2,000 less than the average Arizona public school which spent $7,644. *Id.* at 7. The study also showed that Arizona private school tuition was less than half of the per-pupil public school average revenue. *Id.* at 4. Even though the public schools were spending more money, private schools had higher high school graduation rates, higher college acceptance rates, and better school facilities. *Id.* at 3-6. In 2005,

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[11] *Available at* http://www.goldwaterinstitute.org/article/1299 (last visited Aug. 2, 2010).

[12] *Available at* http://www.goldwaterinstitute.org/article/1851 (last visited Aug. 2, 2010).

22.5% of Arizona private school students were receiving tuition tax credit scholarships under the Arizona Tuition Tax Credit program. *Id.* at 22.

Many respected empirical studies show that school choice has numerous positive benefits. Parents are able to find schools for their children which best suit their needs. Competition creates positive incentives for schools to improve and provide quality education. Students are no longer exclusively tied to public schools that have been determined for them by their addresses. Families of special needs students, minority students, and low-income students have options beyond moving to other districts or paying the entirety of private school tuition. School choice programs decrease educational costs and save states millions of dollars annually, and provide superior educational experiences. The ability of school choice to flourish is imperative because the success of future school choice programs is a key element in solving the current American K-12 educational crisis.

## CONCLUSION

Since this Court's decision in *Zelman*, school choice has taken off in America. Hundreds of thousands of children have escaped failing government schools, seeking and finding wonderful educational opportunities. At less than the cost of public schools, school choice has improved student achievement, and provided special needs students with schools geared toward their unique requirements. As a result, school choice has been applauded by parents, students, and taxpayers nationwide.

This Court is now presented with a follow-up to *Zelman*. In ruling on Establishment Clause challenges to school programs in the past, this Court has continuously emphasized the importance of neutrality and independent choice. Arizona's Section 1089 fulfills both of these requirements. Section 1089 is neutral toward religion by not preferring sectarian over secular schools in either schools receiving funds or STOs that provide funds. Furthermore, Section 1089 has multiple levels of independent choice before any money can go to a sectarian school. Therefore, the Court should reverse the decision of the lower court.

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